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No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE STROH BREWERY COMPANY,
Petitioner,

v.

DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Healy* v. *Beer Institute*, 491 U.S. 324 (1989) ("*Healy II*"), this Court held that all price-affirmation statutes violate the Commerce Clause of the United States Constitution. Despite *Healy II*, in this case a New Mexico trial court entered a judgment of almost $20 million against The Stroh Brewery Company based on New Mexico's price-affirmation statute. The Supreme Court of New Mexico (by a 3-2 vote *en banc*) affirmed, holding that *Healy II* did not apply retroactively. In so holding, the Supreme Court of New Mexico asserted that the retroactivity analysis of last Term's *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), was "inapplicable," and instead purported to apply the retroactivity analysis of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).

The question presented for review is:

Under what circumstances must a decision of this Court announcing new constitutional law be applied retroactively in civil actions?

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, Gallup Sales Company, Pucci Distributing Company, Pecos Sales Company and State Beer Distributors, Inc. appeared before the Supreme Court of New Mexico and are respondents before this Court.*

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* Petitioner The Stroh Brewery Company does not have any parent corporation or subsidiary required to be identified pursuant to Rule 29.1 of the Rules of this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner The Stroh Brewery Company ("Stroh") respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of New Mexico entered in this case on August 12, 1991.

OPINIONS BELOW

The majority, concurring and dissenting opinions of the Supreme Court of New Mexico are reported at 816 P.2d 1090 and are set forth in Appendix A (Pet. App. 1a-32a). The judgment of the First Judicial District Court for the County of Santa Fe, New Mexico, which is unreported, is set forth in Appendix B (Pet. App. 33a-39a).

JURISDICTION

The judgment of the Supreme Court of New Mexico was entered on August 12, 1991. A timely motion by Stroh for a rehearing was denied in an order entered on September 13, 1991. *See* Appendix C (Pet. App. 40a). This Court has jurisdiction to review the judgment of the Supreme Court of New Mexico under 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves three provisions of the United States Constitution: (1) the Commerce Clause, U.S. Const. art. I, § 8, cl. 3; (2) the Case or Controversy requirement, U.S. Const. art. III, § 2, cl. 1; and (3) the Supremacy Clause, U.S. Const. art. VI, cl. 2. This case also involves New Mexico's price-affirmation statute, the Discrimination in Selling Act, 1967 N.M. Laws ch. 269, §§ 1-10 (formerly N.M. Stat. Ann. §§ 60-12-1—60-12-10 (1978)), *as amended by* 1979 N.M. Laws ch. 83, § 1 (formerly N.M. Stat. Ann. § 60-12-2 (Supp. 1979)). These constitutional and statutory provisions are set forth in Appendix D (Pet. App. 43a) and Appendix E (Pet. App. 44a-48a), respectively.

STATEMENT OF THE CASE

Since commencing this action in 1979, Stroh has argued unwaiveringly that New Mexico's price-affirmation statute violates the Commerce Clause of the United States Constitution. Two years ago, in *Healy* v. *Beer Institute*, 491 U.S. 324 (1989) (*"Healy II"*), this Court vindicated Stroh's position, holding that *all* price-affirmation statutes violate the Commerce Clause. The Supreme Court of New Mexico, however, has deprived Stroh of the benefit of *Healy II* and has imposed upon Stroh a judgment of almost $20 million based upon the New Mexico statute, despite conceding that it is unconstitutional under *Healy II*.

1. Stroh Challenges New Mexico's 1979 Price-Affirmation Law

In 1979, New Mexico amended its "price-affirmation" statute to make it applicable to sales of beer at wholesale (the "1979 Law").[1] Pet. App. 44a-48a. Even before the 1979 Law took effect, Stroh (together with other brewers and a trade association) filed a complaint challenging it in the First Judicial District Court for the County of Santa Fe, New Mexico. The complaint alleged that the 1979 Law "imposes an impermissible burden on interstate commerce, in violation of the Commerce Clause of the United States Constitution." Complaint ¶ 26. The complaint sought (1) injunctive relief restraining the Director of the New Mexico Department of Alcoholic Beverage Control (the "Director") from enforcing the 1979 Law and (2) a declaratory judgment holding the 1979 Law "inapplicable, invalid and unenforceable." Complaint at 7.

On the day the complaint was filed, the trial court entered a preliminary injunction enjoining the Director from enforcing the 1979 Law. The preliminary injunction was conditioned upon the execution and filing of bonds (*i.e.*, unsecured undertakings) by each of the brewers. The preliminary injunction bonds were later transformed into supersedeas bonds. Stroh's bond obligated it to pay

> within 60 days after final disposition of this cause . . . the amount representing the difference between the prices at which [Stroh] has sold beer to wholesalers and distributors in New Mexico during the pendency of the injunction, and the price at which [Stroh] would have been required to sell the same beer under the requirements of [the 1979 Law],

---

[1] Like all price-affirmation statutes, the 1979 Law regulated in-state sales prices based upon out-of-state sales prices within a specified period. The 1979 Law obligated a brewer selling beer to wholesalers in New Mexico to do so at prices no higher than the lowest price at which the brewer sold such beer to any wholesaler anywhere else in the country at any time during the preceding calendar month (Pet. App. 45a).

> with interest, if, and only if, it should be finally decided by the courts that said law is valid and the preliminary injunction and stay should not have been entered.

Supersedeas Bond at 2.

2. The New Mexico Courts Rely on *Seagram* to Uphold the 1979 Law

On January 7, 1980, the trial court issued a memorandum opinion upholding the 1979 Law and granting summary judgment to the Director. In rejecting the argument by Stroh and the other brewers that the 1979 Law violated the Commerce Clause, the trial court explicitly relied upon this Court's opinion in *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966) ("*Seagram*"). The trial court concluded: "there is no cause to depart from the analysis made by the U.S. Supreme Court" in *Seagram*. Mem. Op. at 4.

On July 21, 1983, the Supreme Court of New Mexico affirmed, finding *Seagram* "indistinguishable" and concluding: "we agree with the trial court's reading of *Seagram* that on its face the [1979 Law] does not impose an unreasonable burden on interstate commerce." 100 N.M. at 220, 221, 668 P.2d at 1097, 1098. At the close of its opinion, the supreme court reiterated that *Seagram* was "controlling and dispositive," and "remanded to the trial court for proceedings not inconsistent with this opinion." 100 N.M. at 223, 668 P.2d at 1100.

On March 19, 1984, this Court dismissed an appeal by Stroh and the other brewers for want of a substantial federal question. 465 U.S. 1093 (1984).

3. While this Case is on Remand in the Trial Court, this Court in *Healy II* Overrules *Seagram* and Declares All Price-Affirmation Statutes Unconstitutional

While this case was on remand in the New Mexico trial court, this Court in two separate cases invalidated price-affirmation statutes under the Commerce Clause; in

the second of those cases this Court held flatly that *all* price-affirmation statutes violate the Commerce Clause. First, in *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573 (1986) ("*Brown-Forman*"), this Court struck down New York's price-affirmation statute and questioned the continuing viability of *Seagram*. Then, in *Healy II*, 491 U.S. 324 (1989), this Court struck down Connecticut's price-affirmation statute, expressly overruled *Seagram*, and declared that *all* price affirmation statutes are unconstitutional:

> In the interest of removing any lingering uncertainty about the constitutional validity of affirmation statutes and of avoiding further litigation on the subject of liquor-price affirmation, we recognize today what was all but determined in *Brown-Forman*: to the extent that *Seagram* holds that retrospective affirmation statutes do not facially violate the Commerce Clause, it is no longer good law. Retrospective affirmation statutes, like other affirmation statutes, have the inherent practical extraterritorial effect of regulating liquor prices in other States. . . . For the reasons noted today and in *Brown-Forman*, this extraterritorial effect violates the Commerce Clause.

491 U.S. at 343.

4. Despite *Healy II* and *Beam*, the New Mexico Courts Impose Liability Upon Stroh

Despite the unequivocal pronouncement in *Healy II* that *all* price-affirmation statutes are unconstitutional, the New Mexico courts have imposed liability (now exceeding $19 million) upon Stroh based upon New Mexico's price-affirmation statute, the 1979 Law. In its final judgment dated September 24, 1990, the district court declared: "The 1979 Law was constitutional and valid and provided a continuing basis for Stroh's liability . . . from [its enactment] through [its repeal in 1985]." Pet. App. 36a. The district court found Stroh liable under its bond for (1) $17,947,568.37, representing principal and inter-

est through March 31, 1990, (2) further interest of $60,351.55 for each month after March 31, 1990, and (3) the litigation expenses of the Attorney General of New Mexico ($130,641.04 through September 21, 1990). Pet. App. 38a.

Stroh appealed to the Supreme Court of New Mexico. After briefing and argument, but while the case was still *sub judice*, this Court on June 20, 1991 issued its most recent decision addressing the retroactivity of its constitutional decisions, *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991) ("*Beam*"). Recognizing the relevance of *Beam*, two days later Stroh brought the decision to the attention of the Supreme Court of New Mexico. Stroh also offered to submit a supplemental brief addressing *Beam*. That offer was not accepted.

A few weeks later, on August 12, 1991, the Supreme Court of New Mexico affirmed the judgment against Stroh, by a 3-2 vote upon *en banc* consideration. The majority based its decision on its conclusion that this Court's decision in *Healy II* did not have retroactive effect:

> While the statement of this case has been difficult, our resolution of it is relatively simple. It is clear that *Healy II* has in effect "finally invalidated" the 1979 law. Yet there is nothing in the *Healy II* opinion to indicate that the holding is to have retroactive effect. To the contrary, the court stated that *Seagram* "is no longer good law," 491 U.S. at 343, which is the language of prospectivity, not retroactivity.
>
> Second, while we agree with Stroh that *American Trucking Ass'ns* v. *Smith* is not on all fours with the instant case, nonetheless we can glean valuable instruction from that case to guide us in resolving the case at bar. For our purposes, the important point about *American Trucking* is that it did not overrule *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). On the contrary, the Court in *American Trucking* used the decision in *Chevron* to reach its conclusion.

Pet. App. 8a.

The majority then purported to apply the three-pronged analysis of *Chevron* to conclude that *Healy II* did not apply retroactively.[2] At the end of its opinion, the majority made its only reference to this Court's decision in *Beam*: "The recent case of *James B. Beam Distilling Co.* v. *Georgia*, 59 U.S.L.W. 4735 (June 20, 1991), notwithstanding, which we find inapplicable, we affirm the judgment below . . . ." Pet. App. 14a.

One justice of the majority filed a specially concurring opinion "to dispel any conjecture that the recent decision of the United States Supreme Court in [*Beam*] in any way modifies or nullifies today's decision." Pet. App. 15a.

In a lengthy and persuasive dissenting opinion, the two-justice minority concluded that *Healy II* applies retroactively under both *Beam* and *Chevron*. Pet. App. 17a-32a. The dissent criticized the majority for "decid[ing] an issue of federal law—the 'retroactivity' of a decision by the United States Supreme Court—in a way that is contrary to any reasoned application of controlling Supreme Court precedents on the retroactivity question." Pet. App. 17a. The dissent went on to characterize the majority's ruling as "simply an erroneous ruling on an issue of federal law which does a grave injustice to the losing party before us and confers an unwarranted windfall on the parties who have prevailed." Pet. App. 32a.

Stroh filed a timely petition for rehearing addressing *Beam*. On September 13, 1991, the petition was denied without opinion. Pet. App. 40a.

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[2] Under *Chevron*'s three-prong standard, whether a decision applies retroactively is determined by (1) whether it displaces a principle of law upon which reliance may reasonably have been placed, (2) whether retroactive application of the principle will further or retard its operation and (3) whether retroactive application could produce substantial inequitable results. 404 U.S. at 106-07.

REASONS FOR GRANTING THE WRIT

The Supreme Court of New Mexico disregarded a controlling precedent of this Court regarding retroactivity in civil cases—last Term's *Beam* decision—and instead relied upon (and misapplied) older precedents—most notably *Chevron*—that are of dubious authority, if not yet expressly overruled by this Court. As a result, Stroh has erroneously been made liable for almost $20 million based on a statute that is conceded to be unconstitutional. This case presents an excellent opportunity for this Court to provide much-needed clarification of its retroactivity jurisprudence, as well as to remedy a profound injustice to a litigant that for over a decade has justifiably and unceasingly challenged an unconstitutional statute.

This Court should grant a writ of certiorari for two principal reasons:

1. In *Healy II* this Court held that all price-affirmation statutes are unconstitutional, and applied that holding retroactively to the *Healy II* litigants. In *Beam* this Court held that when a new rule of law is applied retroactively in the case in which it is announced, it must be applied to all other litigants in cases on direct review. Stroh, as a litigant in a case on direct review, is entitled under *Beam* to the retroactive application of the constitutional rule announced in *Healy II*. By denying Stroh the benefit of *Healy II*, the Supreme Court of New Mexico directly contravened this Court's holding in *Beam*.

2. The three-pronged civil retroactivity standard established by this Court in *Chevron* was a spin-off from the three-pronged criminal retroactivity standard established by this Court in *Linkletter* v. *Walker*, 381 U.S. 618 (1965). *Linkletter* was overruled on constitutional and equitable grounds in *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), wherein this Court adopted a uniform rule of retroactivity in the criminal context. Because there is not—and never has been—any principled distinction be-

tween retroactivity analysis in the civil and criminal contexts, the time has come for this Court to make its retroactivity jurisprudence clear and consistent by overruling *Chevron* and extending *Griffith*'s uniform rule of retroactivity to the civil arena.

I. THE SUPREME COURT OF NEW MEXICO MISAPPLIED THIS COURT'S DECISIONS ON RETROACTIVITY

A. *Beam* Requires that *Healy II* Be Applied Retroactively and Obviates a *Chevron* Analysis in this Case

Although the Supreme Court of New Mexico acknowledged that whether a decision of this Court applies retroactively is an issue of *federal* law, it virtually ignored this Court's decision in *Beam*, which had been decided less than three weeks earlier. In the one sentence of its opinion addressing *Beam*, the majority cryptically asserted that *Beam* was "inapplicable." This dismissive treatment of *Beam*—as well as the concurring opinion's statement that *Beam* neither "modifies [n]or nullifies" the majority decision—suggests that *Beam* was considered merely as an afterthought. But *Beam* cannot be swept aside so lightly; the Supremacy Clause of the United States Constitution required the Supreme Court of New Mexico to apply *Beam* scrupulously—because not only is *Beam* "applicable" to this case, it is controlling.[3]

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[3] Since *Beam* was decided, this Court has summarily vacated three decisions of state supreme courts that—like the Supreme Court of New Mexico here—applied the *Chevron* retroactivity analysis in finding that a decision of this Court did not have retroactive application:

(1) In *Norwest Bank Duluth* v. *James*, 111 S. Ct. 2881 (1991), this Court vacated a decision by the Supreme Court of Minnesota holding that *Memphis Bank & Trust* v. *Garner*, 459 U.S. 392 (1983), did not have retroactive application.

(2) In *Bass* v. *South Carolina*, 111 S. Ct. 2881 (1991), this Court vacated a decision by the Supreme Court of South

In *Beam*, this Court addressed whether to give retroactive effect to its decision in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), in which this Court struck down a state tax as violative of the Commerce Clause. Like *Healy II*, *Bacchus* had not specifically addressed whether its holding had retroactive effect. Applying the three-pronged analysis of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), a Georgia trial court and the Supreme Court of Georgia both held that *Bacchus* did *not* have retroactive effect. *See James B. Beam Distilling Co.* v. *Georgia*, 259 Ga. 363, 382 S.E.2d 95 (Ga. 1989).

This Court reversed, addressing two central issues: (1) whether the *Bacchus* holding had been applied retroactively to the *Bacchus* litigants and (2) if so, whether the *Bacchus* holding should be applied retroactively to the *Beam* litigants. All nine Justices answered the first issue in the affirmative; six of the nine Justices answered the second issue in the affirmative. The ultimate holding of *Beam* was that when a new rule of law is applied retroactively to the litigants in the case in which it is announced, it must also be applied to all other litigants in cases on direct review.

Carolina holding that *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803 (1989), did not have retroactive application.

(3) In *Harper* v. *Virginia Dep't of Taxation*, 111 S. Ct. 2883 (1991), this Court vacated a decision by the Supreme Court of Virginia holding that *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803 (1989), did not have retroactive application.

See also Northwest Savings Bank v. *Welch*, 111 S. Ct. 2882 (1991) (vacating Second Circuit decision applying *Chevron*). With each of these vacaturs, this Court remanded "for further consideration in light of [*Beam*]."

If the Supreme Court of New Mexico had issued its judgment on the day before *Beam* was decided, this Court presumably would vacate the decision now "for further consideration in light of [*Beam*]." Such a disposition, at a minimum, would also be appropriate under the present circumstances, in which the Supreme Court of New Mexico obviously failed to give *Beam* the "consideration" it required.

Beam produced five separate opinions, but no majority opinion. On the issue of whether the *Bacchus* holding had been applied retroactively to the litigants in *Bacchus*, Justice Souter (joined by Justice Stevens) wrote:

> In most decisions of this Court, retroactivity . . . goes without saying. . . . Because the *Bacchus* opinion did not reserve the question whether its holding should be applied to the parties before it, it is properly understood to have followed the normal rule of retroactive application in civil cases.

111 S. Ct. at 2445 (citation omitted). Justice White explicitly agreed: "I agree with Justice Souter that the opinion in [*Bacchus*] may reasonably be read as extending the benefit of the judgment in that case to the appellant Bacchus Imports." 111 S. Ct. at 2448. Justice Blackmun (joined by Justices Marshall and Scalia) and Justice Scalia (joined by Justices Marshall and Blackmun) not only agreed, but took the position that the Constitution *required* that the *Bacchus* holding be applied to the litigants in that case. 111 S. Ct. at 2449-50, 2450-51. Justice O'Connor (joined by Chief Justice Rehnquist and Justice Kennedy), who dissented both from *Bacchus* and from its application to the *Beam* litigants, also agreed on what the Court had done in *Bacchus*:

> I agree that the Court in *Bacchus* applied its rule retroactively to the parties before it. The *Bacchus* opinion is silent on the retroactivity question. Given that the usual course in cases before this Court is to apply the rule announced to the parties in the case, the most reasonable reading of silence is that the Court followed its customary practice.

111 S. Ct. at 2451.

Thus, in *Beam*, all nine Justices accepted that the Court's earlier silence in *Bacchus* on the issue of retroactivity meant that the case's holding *was* applied retroactively to the *Bacchus* litigants. So also, *Healy II*'s silence on the question of retroactivity must be understood

to mean that *Healy II*'s holding *did* apply retroactively to the *Healy II* litigants. Under the holding of this Court in *Beam*, *Healy II*'s holding therefore must apply retroactively to all other litigants in cases on direct review—including Stroh.

In this case, however, the majority of the Supreme Court of New Mexico disregarded the unanimous view of the Justices of this Court, as expressed in *Beam*, regarding the implications of silence on the issue of retroactivity. The majority inexplicably drew the unwarranted implication of *non*-retroactivity from the absence of an explicit statement of retroactivity in *Healy II*: "[T]here is nothing in the *Healy II* opinion to indicate that the holding is to have retroactive effect." Pet. App. 8a. Similarly, the concurring opinion attempted to distinguish *Beam* by stating: "*Healy II* is void of the indications of retroactivity that the U.S. Supreme Court found in *Bacchus* . . . ." Pet. App. 15a. These statements reveal a fundamental misreading of *Beam*: It was the *silence* in *Bacchus* on the issue of retroactivity—not affirmative "indications of retroactivity" (there were none)—that led this Court to conclude that *Bacchus* must be understood to have applied retroactively.[4]

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[4] Moreover, there are indications, other than silence on the issue, that this Court applied its holding in *Healy II* retroactively to the litigants in that case. In *Healy II*, the United States Court of Appeals for the Second Circuit struck down Connecticut's price-affirmation statute on June 13, 1988. The mandate of the court of appeals was issued on September 8, 1988. (Connecticut failed in both the court of appeals and this Court to obtain a stay of the issue of the mandate.) Accordingly, the Connecticut statute at issue in *Healy II* was not enforced for more than nine months before this Court's decision in the case (*i.e.*, from September 8, 1989 to June 19, 1989). Yet in *Healy II* this Court did not resurrect the Connecticut statute or declare it invalid only from June 19, 1989 onward. Nor did the Court suggest any penalties or remedies based on the brewers' sales in the period prior to its decision. Instead

The Supreme Court of New Mexico's failure to follow *Beam* plainly would justify summary disposition by this Court.[5] Whether *Healy II* applied retroactively was a central issue in the briefs and arguments before the Supreme Court of New Mexico. While the appeal was pending this Court issued *Beam*—a controlling precedent that specifically addressed the retroactivity of new constitutional decisions in civil litigation. Nevertheless, the Supreme Court of New Mexico, while rejecting Stroh's offer of further briefing, blatantly disregarded this Court's holding in *Beam* and issued a judgment squarely at odds with it.

B. Even Under a *Chevron* Analysis, *Healy II* Must be Applied Retroactively

In light of *Beam* and other recent decisions by this Court the authority of *Chevron* is dubious at best (*see infra* Part II). One thing about *Chevron* is clear, however: under its three-prong retroactivity analysis a critical issue is whether retroactive application of "new" law would upset justified reliance upon "old" law. In its purported attempt to apply *Chevron*—which would have been obviated by proper application of *Beam*—the majority of the Supreme Court of New Mexico flatly overlooked whether retroactive application of the "new" law of

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the Court simply announced: "The judgment of the Court of Appeals is affirmed." 491 U.S. at 343.

One week after *Healy II* was decided, this Court vacated and remanded another case "for further consideration in light of [*Healy II*]." *See Brown-Forman Corp.* v. *Tennessee Alcoholic Bev. Comm'n*, 492 U.S. 902 (1989). Such a disposition would not have been appropriate unless *Healy II* was to be given retroactive effect.

[5] This Court recently summarily reversed a state court that, as here, misapprehended controlling precedents and thereby failed to give retroactive effect to a constitutional decision of this Court. *See National Mines Corp.* v. *Caryl*, 110 S. Ct. 3205 (1990) (per curiam). *See also Roberts* v. *Russell*, 392 U.S. 293 (1968).

Healy II would upset justified reliance by the State of New Mexico upon the "old" law of *Seagram*.[6]

In *American Trucking Ass'ns* v. *Smith*, 110 S. Ct. 2323 (1990), this Court addressed whether its earlier decision invalidating an Arkansas tax would be applied retroactively. To the four-Justice plurality that applied the *Chevron* analysis in that case, Arkansas's reliance upon the validity of the tax (*i.e.*, collecting and spending millions of dollars in tax revenues) precluded retroactivity:

> [B]ecause the State cannot be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent. . . . A refund, if required by state or federal law, could deplete the state treasury, thus threatening the State's current operations and future plans.

110 S. Ct. at 2333 (O'Connor, J., plurality opinion, joined by Rehnquist, C.J., and White and Kennedy, J.J.). Because Arkansas had been justified in its reliance on "old" constitutional law (permitting the tax statute), the "new" constitutional law (striking down the statute) would not be applied retroactively to it.

Beam also involved whether a State would have to refund taxes collected under a statute later found unconstitutional. As in *Smith*, those Justices favoring a *Chevron* analysis (now three and in dissent) emphasized the State's reliance interest: "To impose on Georgia and the

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[6] Instead the majority focused upon the fact that other brewers had earlier settled out of this action. To the majority, it would be "inequitable" for Stroh to succeed in this action after other brewers had settled with the State of New Mexico. Pet. App. 12a. But those brewers compromised with the State for their own reasons before *Healy* II was decided. And they settled for a small fraction of the liability that has been imposed on Stroh in this action. Stroh, vested with steadfast conviction in the correctness of its position, declined to compromise. Contrary to the majority's assertion, there is no basis in equity for denying relief to a deserving litigant merely because his co-parties have settled.

other States that reasonably relied upon this Court's established precedent such extraordinary retroactive liability . . . is the height of unfairness." 111 S. Ct. at 2455 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.).

The present case is fundamentally different from both *Smith* and *Beam* with respect to the State's claim of reliance. In both of those cases the party challenging the constitutionality of the State statute was seeking a tax refund—that is, seeking to make the State return funds it had collected and spent in reliance upon "old" law. In this case, on the other hand, the State of New Mexico—which was enjoined from enforcing the 1979 Law—has not collected or spent any funds in reliance upon *Seagram*, nor does Stroh seek any refund. (Indeed, the 1979 Law was not a revenue statute; only by virtue of the bonds entered into in this action is the State of New Mexico even arguably entitled to receive funds from Stroh.) Unlike in *Smith* and *Beam*, the issue here is whether Stroh—the private party—will *now* have to pay money based upon a statute that is recognized to be invalid.[7]

Retroactivity in this case thus would not impose any of the "jolting" or "disruptive" consequences that the *Smith* plurality and the *Beam* dissent sought to avoid under the *Chevron* analysis. The equities in this case all favor Stroh, which instituted this action over a decade ago and has argued continuously since then that New Mexico's price-affirmation law is unconstitutional. Stroh was right (*see Healy II*), and the State of New Mexico did not and cannot identify any reliance interests that militate against Stroh receiving the benefits of *Healy II*.[8]

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[7] The dissenting opinion in the Supreme Court of New Mexico recognized the absence of the element of reliance in this case: "[T]here is no suggestion in this case that anyone relied on the 1979 price-affirmation law in doing anything." Pet. App. 30a.

[8] It is thus apparent that under either *Beam* or *Chevron* the Supreme Court of New Mexico erred by declining to give retroac-

II. THIS COURT SHOULD MAKE ITS RETROACTIVITY JURISPRUDENCE CLEAR AND CONSISTENT BY OVERRULING *CHEVRON* AND ADOPTING A UNIFORM RULE OF RETROACTIVITY IN CIVIL CASES

In each of its last two Terms, this Court has issued a sharply divided decision addressing retroactivity in the civil context. *See Beam*, 111 S. Ct. 2439; *Smith*, 110 S. Ct. 2323. Together, the two cases produced eight separate opinions; neither produced a majority opinion. Although in neither case did a party urge this Court to overrule *Chevron*, in each case a majority of the Justices appeared prepared to do so. Because the Court did not explicitly overrule *Chevron*, however, state and lower federal courts have continued to apply it, albeit while recognizing that its viability is highly dubious. Only this Court can resolve the uncertainty of *Chevron*'s status, and this case provides an excellent opportunity to do so.

A. Recent Decisions by this Court Indicate that *Chevron* Does Not Provide the Standard for Determining Retroactivity in Civil Cases

Although this Court has been pronouncing "new" law—constitutional and otherwise—for about two centuries, the practical consequences of its decisions pronouncing "new" law have been remarkably unsettled until relatively recently. In a line of cases beginning with *Linkletter* v. *Walker*, 381 U.S. 618 (1965), this Court established a three-pronged standard for determining whether decisions pronouncing "new" law would be applied retroactively. In *Linkletter*, a criminal case, this Court surveyed its earlier decisions addressing retroactivity and

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tive effect to *Healy II*. Under similar circumstances this Court recently summarily reversed the judgment of a state supreme court. *See National Mines Corp.* v. *Caryl*, 110 S. Ct. 3205 (1990) (per curiam) (summarily reversing judgment declining to give retroactive effect to *Armco* v. *Hardesty*, 467 U.S. 638 (1984)).

specifically observed that "no distinction was drawn between civil and criminal litigation.'" 381 U.S. at 627.[9]

Six years after *Linkletter*, this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), expressly considered whether one of its decisions would apply retroactively in the context of civil litigation. The Court acknowledged that retroactivity "[i]n recent years . . . has been most conspicuously considered in the area of the criminal process." 404 U.S. at 105-06. The Court went on to address the various considerations relevant to determining retroactivity under civil and criminal cases alike—including *Linkletter*. This Court then adopted a three-pronged standard—akin to *Linkletter*'s—for determining whether a decision pronouncing "new" law applies retroactively in the civil context. 404 U.S. at 106-07.[10]

Certain Justices of this Court had criticized *Linkletter*'s three-pronged, case-by-case analysis from its inception on constitutional, policy and equitable grounds.[11] Most notable among those criticisms were two lengthy opinions by the most recent Justice Harlan in *Desist* v. *United States*, 394 U.S. 244 (1969), and *Mackey* v. *United States*, 401 U.S. 667 (1971). In his dissent in *Desist*, Justice Harlan stated: "I can no longer . . . remain content with the doctrinal confusion that has characterized our efforts to apply the basic *Linkletter* principle. 'Retroactivity' must

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[9] Moreover, in fashioning its three-pronged standard, this Court in *Linkletter* relied upon both civil and criminal precedents. Because this Court's docket in the second half of the 1960s produced a steady stream of cases considering the retroactivity of "new" constitutional rules in the criminal arena, however, the *Linkletter* standard quickly became associated with criminal cases.

[10] *See supra* note 2.

[11] *See United States* v. *Johnson*, 457 U.S. 545 n.9 (1982) (collecting "consistent stream of opinions" criticizing *Linkletter* standard); *see also Teague* v. *Lane*, 489 U.S. 288, 302-05 (opinion of O'Connor, J.) (reviewing criticisms of *Linkletter* standard by commentators).

be rethought." 394 U.S. at 258. In his concurring opinion in *Mackey*, Justice Harlan wrote:

> [T]he subsequent course of *Linkletter* [has become] almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim. . . . It was this train of events that impelled me to suggest two Terms ago in *Desist* that the time had come for us to pause to consider just where these haphazard developments might be leading us.

401 U.S. 676-77.

In Justice Harlan's view, basic principles of constitutional adjudication required that this Court apply the prevailing law in all cases coming before the Court on direct review. In *Desist*, he stated: "all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down." *Id.* In *Mackey*, Justice Harlan eloquently added:

> If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.

401 U.S. at 679. *See also United States* v. *Estate of Donnelly*, 397 U.S. 286, 296 (1970) (Harlan, J., concurring) (in civil case "once the decision to abandon precedent is made, I see no justification for applying principles determined to be wrong, be they constitutional or otherwise, to litigants who are in or may still come to court").

In *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), Justice Harlan's view prevailed: this Court abandoned *Linkletter*'s three-pronged standard for all criminal cases on direct review and adopted a clear rule of absolute retro-

activity. The Court held: "In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U.S. at 322. The Court premised its holding upon (1) the constitutional principle "that this Court adjudicates only 'cases' and 'controversies'" (*id.* at 322) and (2) the equitable principle of "treating similarly situated defendants the same" (*id.* at 323).[12]

The constitutional and equitable principles invoked in *Griffith* apply with equal force in civil litigation. Justice Harlan recognized as much. *See Estate of Donnelly*, 397 U.S. at 295-97 (Harlan, J., concurring). But in *Griffith* the Court cautiously noted that civil retroactivity "continues to be governed by the standard announced in [*Chevron*]." 479 U.S. at 322 n.8. As a consequence of *Griffith*, retroactivity in the civil arena has been in an anomalous state: *Chevron* appears to retain force, even though its progenitor, *Linkletter*, has been explicitly overruled.

The dubious status of *Chevron*'s three-pronged approach became apparent in *American Trucking Ass'ns* v. *Smith*, 110 S. Ct. 2323 (1990). The plurality opinion of Justice O'Connor (joined by Chief Justice Rehnquist and Justices White and Kennedy) viewed *Chevron* as con-

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[12] In a concurring opinion, Justice Powell stated that he considered the holding in *Griffith* "an important step toward ending the confusion that has resulted from applying [*Linkletter*] on a case-by-case basis." 479 U.S. at 328. In *Teague* v. *Lane*, 489 U.S. 288 (1989), this Court took another such step by embracing another aspect of Justice Harlan's views on retroactivity. In that case, this Court put the final nail in the coffin of *Linkletter*'s three-prong test by "adopt[ing] Justice Harlan's approach to retroactivity for cases on collateral review." 489 U.S. at 292.

The reliance of the majority of the Supreme Court of New Mexico in this case upon *Linkletter* (Pet. App. 9a-12a), despite its explicit overruling in *Griffith* and *Teague*, underscores the majority's misapprehension of this Court's retroactivity jurisprudence.

trolling, noting that *Griffith* did not purport to overrule the case. 110 S. Ct. at 2331. The dissenting opinion of Justice Stevens (joined by Justices Brennan, Marshall and Blackmun) viewed *Griffith* as controlling: "The Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently." 110 S. Ct. at 2350. Justice Scalia, casting the deciding vote, accepted as a general matter that the Constitution requires retroactive application of "new" law, but in that case declined to accord the "new" law retroactive effect because he considered it to be an erroneous rule. 110 S. Ct. at 2343-45. Consequently, in *Smith* a majority of the Justices indicated that the United States Constitution requires retroactive application of "new" law in civil actions (as well as in criminal actions), but that majority did not join together in judgment.[13]

Beam also failed to generate a majority opinion, but a majority of the Justices again rejected *Chevron*'s three-pronged standard for deciding retroactivity. While observing that "[b]oth parties have assumed the applicability of the *Chevron Oil* test," Justice Souter (joined by Justice Stevens) suggested that *Chevron* was not in fact applicable because *Griffith*'s rule of absolute retroactivity "cannot be confined to the criminal law." 111 S. Ct. 2445, 2446. Justice Blackmun (joined by Justices Marshall and Scalia) and Justice Scalia (joined by Justices Blackmun and Marshall) opined that the Constitution requires retroactive application of all decisions pronouncing new law. 111 S. Ct. at 2449-50. Justice White stated that he was

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[13] Shortly after *Smith*, this Court decided two other cases addressing the retroactivity of decisions of this Court. *See Ashland Oil, Inc.* v. *Caryl*, 110 S. Ct. 3202 (1990); *National Mines Corporation* v. *Caryl*, 110 S. Ct. 3205 (1990). In both cases this Court issued a Per Curiam opinion, reversing the state court and holding that retroactive application was required under the reasoning of either the plurality or the dissent in *Smith*. *Ashland Oil*, 110 S. Ct. at 3204; *National Mines*, 110 S. Ct. at 3206.

not presently "retreat[ing]" from the *Chevron* analysis, but acknowledged that five other Justices had suggested they would. 111 S. Ct. at 2448-49. In dissent, Justice O'Connor (joined by Chief Justice Rehnquist and Justice Kennedy) embraced *Chevron*, while recognizing that it was being undercut by the Court's judgment. 111 S. Ct. 2451-56.[14]

As a recent commentary observes, if *Chevron*'s three-pronged civil retroactivity standard exists alongside *Griffith*'s absolute criminal retroactivity rule, then a statute could be regarded as constitutional in determining the civil liability of a party for certain conduct, but unconstitutional in determining the criminal liability of the same party for the same conduct. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1767-68 (1991). The commentary concludes: "Insofar as the Court's retroactivity jurisprudence is rooted in article III or allied notions of the 'basic norms of constitutional adjudication' or 'the integrity of judicial review,' *Griffith* v. *Kentucky*, 479 U.S. 314, 322-23 (1987), no distinction between civil and criminal cases seems justified." *Id.* at 1769 n.208.

The present case provides a particularly apt illustration of the unwarranted asymmetry created by the coexistence of *Chevron* and *Griffith*. New Mexico's 1979 Law provided both *civil* and *criminal* penalties for its violation. Had New Mexico criminally prosecuted Stroh, *Griffith*'s absolute rule would mandate a determination

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[14] The specific holding in *Beam*—regardless of the reasoning underlying it—severely undercuts the case-by-case analysis contemplated by the *Chevron* three-pronged standard. Under *Beam*, when "new" law is applied retroactively in one case, the "new" law must be applied retroactively in all other cases on direct review. Thus, the *Chevron* analysis—if still valid at all—appears to be an appropriate exercise only until the "new" law is first applied retroactively. From then on *Beam* requires retroactive application of the new law in all other cases on direct review. *See Beam*, 111 S. Ct. at 2452 (O'Connor, J., dissenting).

that under *Healy II* Stroh had no liability. Because New Mexico seeks to impose civil liability upon Stroh, however, under *Chevron* that liability would depend upon the outcome of a three-pronged, case-specific test.

The state of the law on retroactivity in civil cases thus is confused at best. Although *Chevron* has not been overruled (at least explicitly),[15] its underpinnings collapsed by virtue of *Griffith's* overruling of *Linkletter*, and a majority of the Justices of this Court twice has suggested it is not controlling law. This case presents this Court with an ideal opportunity to overrule *Chevron* and thus to make its retroactivity jurisprudence clear and consistent.

B. State and Federal Courts Need Guidance as to the Viability of the *Chevron* Standard

Whether decisions of this Court announcing "new" law apply retroactively is a frequently recurring issue in the state and lower federal courts. Indeed, because it has been this Court's general practice not to address retroactivity issues in decisions announcing "new" law,[16] the state and lower federal courts are confronted with retroactivity issues virtually every time this Court announces "new" law. Uniform application of this Court's decisions announcing "new" law thus requires that the state and

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[15] On the same day that this Court decided *Beam*, it decided another case that suggests that *Chevron* is bad law. In *Lampf* v. *Gilbertson*, 111 S. Ct. 2773 (1991), this Court pronounced a new limitations period for actions under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and applied it in that case to dismiss the plaintiff's § 10(b) claim. A dissenting opinion argued vigorously that the application of the new limitations period in the case announcing it contradicted the holding and the analysis of *Chevron*. 111 S. Ct. at 2451 (O'Connor, J., dissenting, joined by Kennedy, J.).

[16] *See, e.g.*, *Smith*, 110 S. Ct. at 2337 (plurality opinion of O'Connor, J.) ("In the civil arena, we have generally considered the question of retroactivity to be a separate problem, one that need not be resolved in the law-changing decision itself.").

lower federal courts have clear guidance from this Court as to the standards governing retroactivity.

In the context of criminal cases, this Court in *Griffith* and *Teague* has recently provided authoritative guidance to the state and lower federal courts. In the context of civil cases, however, this Court has not spoken in a clear manner. *Chevron*'s three-pronged standard, which once was accepted as the touchstone of retroactivity in civil cases, was undercut doctrinally in *Griffith*, which on constitutional and equitable grounds rejected a case-specific retroactivity analysis. Moreover, in recent cases addressing retroactivity in the civil context, a majority of the Justices of this Court have questioned—or rejected outright—*Chevron*'s standard. *See supra* Part II.A. The state and lower federal courts are thus in urgent need of clarification from this Court.

Though only six months have passed since *Beam* was decided, in that time numerous state and lower federal courts have questioned whether *Chevron* continues to have force. Not only do these cases evidence the confusion created by the current state of this Court's retroactivity doctrine, but the sheer number of cases addressing the issues of civil retroactivity in that brief period underscores the recurring nature of the issue and the need for this Court to eliminate this confusion.[17]

A number of state courts of last resort have recently expressed uncertainty over *Chevron*'s status:

• In *Harper* v. *Virginia Department of Taxation*, No. 900770 (November 8, 1991), *pet. for cert. filed*, 60 U.S.L.W. 3406 (U.S. Nov. 15, 1991) (No. 91-794), the Supreme Court of Virginia stated: "[W]e do not read *Beam* as rejecting the *Chevron Oil* test. . . . *Beam* is im-

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[17] A computerized search reveals that since *Beam* was decided at least 40 state or federal courts have confronted the question of the continuing viability of *Chevron*.

portant not only for what it decided but also for what it did not decide." [18]

• In *Swanson* v. *North Carolina*, 329 N.C. 576, 407 S.E.2d 791 (Aug. 14, 1991), the Supreme Court of North Carolina stated:

> We might conclude from [*Smith*] that a majority of the Supreme Court is moving away from the non-retroactive application of constitutional decisions. We do not believe we should so conclude. In *Beam* the Court had an opportunity to say that the rule of *Chevron* should no longer be applied in civil cases and declined to do so. We do not believe we should anticipate a change in the law by the United States Supreme Court, but should adhere to the opinions as they are now written.

329 N.C. at 584, 407 S.E.2d at 795. A dissenting justice observed that "the continuing viability of the *Chevron* test has been brought into question by [*Beam*]." 329 N.C. at 588, 407 S.E.2d at 797.

• In *Devrnja* v. *West Virginia Board of Medicine*, 408 S.E.2d 346 (July 23, 1991), the Supreme Court of Appeals of West Virginia observed: "Whether *Chevron* still stands is a question whose answer may be sought in the Supreme Court's more recent plurality opinions in [*Smith*] and [*Beam*]. We decline to unravel this tangled federal scheme . . . ." 408 S.E.2d at 349.

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[18] The petition for certiorari recently filed in *Harper* identifies the judgment by the Supreme Court of New Mexico in this case as an example of the misapplication of *Beam*. Pet. for Cert. (No. 91-794) at 8-9.

Harper is not the only other case on this Court's docket that involves the issue of whether a decision of this Court is to be accorded retroactive effect. *See Pledger* v. *Bosnick*, *pet. for cert. filed*, 60 U.S.L.W. 3173 (U.S. Sept. 3, 1991) (No. 91-375); *see also Barker* v. *Kansas*, *pet. for cert. granted*, 60 U.S.L.W. 3042 (U.S. Nov. 27, 1991) (No. 91-611) (petitioner raised retroactivity issues but they were not addressed by state supreme court).

• In *Sheehy* v. *Montana*, No. 90-450 (Nov. 14, 1991), the Supreme Court of Montana split three ways on the question of *Chevron*'s applicability in light of *Beam*. A dissenting justice criticized the majority for "ignor[ing] Justice O'Connor's dissenting opinion wherein she states that the *Beam* decision 'seriously curtails the *Chevron Oil* inquiry.'" (Quoting *Beam*, 111 S. Ct. at 2452 (O'Connor, J., dissenting).)

• In *Kuhn* v. *Colorado*, 817 P.2d 101 (Sept. 16, 1991), the Supreme Court of Colorado noted: "The continuing viability of the *Chevron* test is left in doubt by [*Beam*]." 817 P.2d at 110 n.8.

Lower federal courts have also recently expressed uncertainty over *Chevron*'s status:

• In *Welch* v. *Cadre Capital*, 923 F.2d 989 (1991), the United States Court of Appeals for the Second Circuit applied *Chevron* in the context of a statute of limitations and observed: "Whether *Chevron* retains validity for issues of retroactivity outside the context of statutes of limitations has been placed in doubt by [*Smith*] . . . ." 923 F.2d at 993 n.6. After vacatur and remand by this Court, *sub nom. Northwest Savings Bank* v. *Welch*, 111 S.Ct. 2882 (1991), the Second Circuit stated: "[U]ntil advised to the contrary, we feel obliged to disregard the prior teaching of [the *Chevron* line] and apply the more recent guidance of *Jim Beam*." *Welch*, No. 90-7419 (Oct. 7, 1991).

• In *Chowaniec* v. *Arlington Park Race Track Ltd.*, 934 F.2d 128 (1991), decided just before *Beam*, the United States Court of Appeals for the Seventh Circuit applied *Chevron* but stated: "We realize that the various opinions filed in [*Smith*] place in question whether *Chevron* retains validity as a general approach to retroactivity." 934 F.2d at 132 n.5.

• In *United States* v. *Spokane*, 918 F.2d 84 (1990), *cert. denied*, 111 S. Ct. 2888 (1991), the United States

Court of Appeals for the Ninth Circuit applied *Chevron* in giving retroactive effect to a decision, but stated: "There is much jurisprudential debate about the propriety of any [retroactivity] analysis in the area of the constitution. *See* [*Smith*], 110 S. Ct. at 2343 (Scalia, J., concurring). We, of course, cannot enter the arena. We leave the battle to other gladiators." 918 F.2d at 89 n.4.

• In *Robinson* v. *Caulkins Indiantown Citrus Co.*, 771 F. Supp. 1205 (S.D. Fla. Aug. 30, 1991), the district court addressed *Beam* in circumstances very similar to this case: "After these matters were fully briefed and pending before the court, the Supreme Court issued its opinion in [*Beam*]. Because the case calls into question the continuing vitality of the *Chevron* doctrine, the court feels compelled to address its applicability to this matter." 771 F. Supp. at 1211. The district court went on to provide an extended analysis of *Beam*, concluding: "It may well prove true that the Court's retroactivity doctrine has become so laden with Ptolemaic epicyles that its collapse will soon be upon us. Until a majority of the Court overrules *Chevron*, however, the principles of that case are still good law with respect to pure prospectivity and selective retroactivity, and, as such, must be applied by this court." 771 F. Supp. at 1214.

• In *Randolph County Federal Savings and Loan Ass'n* v. *Sutliffe*, No. C-1-91-240 (S.D. Ohio Oct. 15, 1991), the district court stated: "Irrespective of whether the *Chevron Oil* analysis is valid in limited circumstances, the Court must conclude that *Beam* applies to this litigation."

• In *Peron* v. *Orr*, No. S85-511 (N.D. Ind. July 31, 1991), the district court stated: "This court reads the opinions in *James B. Beam* as indicating that [the *Chevron*] analysis is appropriate only for the court initially announcing the new rule . . ."

• In *Berning* v. *A.G. Edwards & Sons, Inc.*, No. 89-C-6483 (N.D. Ill. Sept. 12, 1991), the district court stated: "it is questionable whether the *Chevron*-type analysis . . .

is still fully viable in light of *Beam*. . . . *Beam* calls for application of one consistent rule in all lawsuits."

The foregoing expressions of confusion and uncertainty illustrate the necessity for clear and authoritative guidance from this Court as to the standards that govern whether a decision of this Court announcing "new" law applies retroactively in civil cases; but they only begin to reveal the immeasurable time and prodigious effort that lower courts and litigants have devoted to trying to harmonize this Court's decisions on civil retroactivity. In *Griffith* this Court recognized the importance of "instructing the lower courts" as to retroactivity in the criminal context. 479 U.S. at 323. Plenary consideration of this case would provide an excellent opportunity for this Court to "instruct[] the lower courts" as to retroactivity in the civil context.

CONCLUSION

The petition for a writ of certiorari should be granted and (1) the judgment of the Supreme Court of New Mexico should be summarily vacated or reversed, or (2) this case should be set for plenary consideration.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 19,547

THE STROH BREWERY COMPANY,
Plaintiff-Appellant,

vs.

DIRECTOR OF THE NEW MEXICO DEPARTMENT
OF ALCOHOLIC BEVERAGE CONTROL,
Defendant-Appellee,

and

GALLUP SALES COMPANY, PUCCI DISTRIBUTING COMPANY,
PECOS SALES COMPANY and
STATE BEER DISTRIBUTORS, INC.,
Intervenors-Appellees.

Appeal from the District Court of Santa Fe County
Art Encinias, District Judge

[Filed Aug. 12, 1991]

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OPINION

SOSA, Chief Justice.

Stroh Brewery Company (Stroh) appeals summary judgment granted to the Director of the New Mexico Department of Alcoholic Beverage Control (the Director), awarding the Director nearly $18 million in damages plus interest. The damages represent the court's determination of the difference between the price at which Stroh sold beer in New Mexico between 1979 and 1985 and the price at which Stroh allegedly was supposed to sell its beer under statutes discussed below. Intervenors are various wholesale liquor distributors allegedly harmed by Stroh's action in selling them beer in violation of the statutes. Intervenors and the Director have agreed among themselves to divide equally any judgment enforced against Stroh. For brevity we will refer to the appellees as the Director; the Director and the Intervenors advance much the same arguments on appeal.

We break down our discussion of this long, complex case into the following segments:

(1) In 1979, Stroh's predecessor in this action filed a complaint seeking a declaratory judgment and injunctive relief, alleging that the price affirmation requirement of the 1979 "Discrimination in Selling Act" [1] (the 1979 law) violated the Commerce Clause of the United States Constitution.

(2) The trial court entered a preliminary injunction temporarily enjoining the Director from enforcing the law, contingent upon Stroh's predecessor executing a bond, the pertinent terms of which were as follows:

> [Stroh agrees to pay] the amount representing the difference between the prices at which [Stroh] has sold beer to wholesalers and distributors in New

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[1] 1967 N.M. Laws ch. 269 §§ 1-10 (formerly codified at NMSA 1978, §§ 80-12-1 to -10) (Orig. Pamp. & Cum. Supp. 1979), repealed by 1981 N.M. Laws ch. 39, 128. *See infra* note 2 at 2.

> Mexico during the pendency of the injunction, and the price at which [Stroh] would have been required to sell the same beer under the requirements of [the 1979 law], with interest . . . if and only if, it should be finally decided by the Court that [the 1979 law] is valid and the preliminary injunction should not have been entered.

(3) The trial court then issued a memorandum opinion on January 7, 1980, granting summary judgment to the Director, upholding the constitutionality of the 1979 law in reliance on *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966) (*Seagram*) (upholding New York's retrospective price affirmation law).

(4) Stroh's predecessor appealed the January 7, 1980 summary judgment. The court continued the preliminary injunction bond as a supersedeas bond during the pendency of the appeal. While the appeal was pending, the Legislature repealed the 1979 law and enacted a new version of the prior statute—the 1981 law.[2]

(5) For purposes of this appeal, the pertinent portions of the 1979 and 1981 laws, respectively, are as follows:

> *Section 60-12-6* [*the 1979 law*]—*Filing of affirmation* There shall be filed in connection with . . . the schedule filed for a brand of alcoholic liquor, an affirmation duly verified by the owner of the brand of alcoholic liquor that the bottle and case price . . . to wholesalers . . . is no higher than the lowest price at which such item of liquor was sold by the brand owner . . . to any wholesaler anywhere in any other state . . . at any time during the calendar month immediately preceding the month in which the schedule is filed.

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[2] 1981 N.M. Laws ch. 39, §§ 1-130, formerly codified at NMSA 1978, §§ 80-8A-12 to 80-3A-19 (Cum. Supp. 1981). The 1979 law was repealed in § 128.

> *Section 60-8A-15 [the 1981 law]—Filing of affirmation* The owner of a brand of alcoholic beverages shall file as part of the schedule a verified affirmation that the price to New Mexico wholesalers is no greater than the lowest price at which the item of alcoholic beverages is sold by the brand owner . . . to any wholesaler anywhere in any other state. . . .

Thus the principle difference between the two statutes was that in the 1979 law the comparison period for affirmed prices was tied to the prior month, while for the 1981 law there was a contemporaneous price affirmation requirement.[3]

(6) On July 21, 1983, we affirmed the trial court's January 7, 1980 summary judgment. *United States Brewers Ass'n v. Director of N.M. Dep't of Alcoholic Beverage Control*, 100 N.M. 216, 668 P.2d 1093 (1983), *appeal dismissed*, 465 U.S. 1093 (1984). We reasoned that the trial court had correctly applied the *Seagram* holding. *Id.* at 220-21, 668 P.2d at 1097-98. We held that *Seagram* was dispositive and remanded the case for further proceedings. *Id.* The constitutionality of the 1981 law was not before us in *United States Brewers Ass'n.* Stroh [4] appealed our decision to the Supreme Court, but

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[3] The 1981 law also provided: "Nothing contained [in the 1981 law] shall prevent differentials in price which make only due allowance for differences in state taxes and fees and in the actual cost of delivery." 1981 N.M. Laws ch. 39, § 67. There was also a severability clause in the act: "If any part . . . of this act is invalid, the remainder . . . shall not be affected." *Id.*, § 891. Stroh contends that this clause has the effect of saving the repealing section from constitutional infirmity and thus argues that if the pricing affirmation section of the 1981 law as written was unconstitutional, the repealing section nonetheless survived and thus effectively repealed the 1979 law. Therefore, Stroh argues, the 1979 law could not have revived during any period in which the 1981 law was unconstitutional. See discussion *infra* note 8, at 6.

[4] By this point in time, Stroh, which by now had acquired the assets of its predecessor in interest, had been substituted by our order as plaintiff-appellant in the appeal before us.

the appeal was dismissed for lack of a substantial federal question. *United States Brewers Ass'n v. Rodriguez*, 465 U.S. 1093 (1984).

(7) On June 14, 1985, the 1981 law was amended to exclude beer from the price affirmation requirement.[5] Hence Stroh's liability, if any, under either the 1979 or 1981 laws, ceased when the new statute went into effect. Prior to the effective date of the new statute, on February 21, 1985, the trial court dissolved both the injunction and the stay of enforcement which had been in effect pending appeal and remand. The parties agree that the maximum damage liability period, if any, runs from June 15, 1979, through February 21, 1985. Stroh contends this maximum period is inapplicable.

(8) During the period when *United States Brewers Ass'n* was on remand to the trial court, the United States Supreme Court issued two opinions decisively changing the law on the subject of pricing affirmation requirements in statutes similar to the 1979 and 1981 laws. First,[6] in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), the Court struck down New York's prospective price affirmation statute.[7] Second,

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[5] 1985 N.M. Laws ch. 5, §§ 1-5; NMSA 1978, §§ 60-BA-12 to -18 (Cum. Supp. 1988).

[6] Pending appeal before us, the Supreme Court decided *Healy v. United States Brewers Association*, 464 U.S. 909 (1983) (*Healy I*). In that decision the Court upheld the Second Circuit's invalidating Connecticut's prospective price affirmation statute.

[7] Both *Brown-Forman* and *Healy I*, note 6, above, effectively invalidated statutes that obligated a seller to file an affirmation on price at the beginning of each calendar month. For this reason the Court considered the statutes "prospective." The parties to the case at bar have disagreed over whether the 1981 law was "prospective" (Stroh) or "concurrent" (the Director).

The Court in *Brown-Forman* all but held that *any* price affirmation statute, prospective or retrospective, was invalid. In *Brown-Forman Corp. v. New Mexico Dep't of Alcoholic Beverages*, 672 F. Supp. 1383 (D.N.M. 1987), the court found that the 1981 law was

in *Healy v. Beer Institute*, 491 U.S. 324 (1989) (*Healy II*), the Court overruled *Seagram* and declared all pricing affirmation statutes unconstitutional. 491 U.S. at 343.

(9) The parties then moved again for summary judgment, with Stroh arguing that after *Healy II* the 1979 law had been shown to be "finally invalid" under the terms of the bond, and thus Stroh had no liability under the bond. Although conceding that the 1981 law was unconstitutional because of *Healy II*, the Director nonetheless argues that the 1979 law entitled it to damages from 1979 to 1985, even though the 1979 law was arguably in effect only until 1981, when the 1981 law purportedly repealed the 1979 law. The Director argued both that the 1979 law revived when the 1981 law became unconstitutional and that our holding in *United States Brewers Ass'n*, upholding the 1979 law, was the law of the case.

(10) The trial court agreed with the Director and granted summary judgment, which Stroh now appeals. The trial court ruled, *inter alia*, "The 1979 law was constitutional and valid and provided a continuing basis for Stroh's liability. . . . [T]he validity of the 1979 law is a closed question. . . . Because the 1979 law is valid, Stroh is liable upon its bond and all that remains is to determine the exact amount which Stroh owes the State."

(11) On appeal, Stroh asserts the following:

> (a) The 1979 law has been finally decided to be invalid. Thus, Stroh never had and does not have now any liability under the bond;
>
> (b) Even if it should be decided that the 1979 law were valid, that law was repealed by the 1981 law,

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"concurrent," but on the strength of the Supreme Court's *Brown-Forman* decision opined that any price affirmation statute would fail to pass constitutional muster, and struck down the 1981 law, 672 F. Supp. at 1385-88. The United States District Court's prediction was vindicated by the Supreme Court's opinion in *Healy v. Beer Institute*, 491 U.S. 324 (1989) (*Healy II*).

and, not having revived, imposes no liability on Stroh past the date of its repeal.[8]

The parties advance the following arguments on appeal. Stroh argues that our holding in *United States Brewers Ass'n* is not the law of the case and should not be applied as such in determining if Stroh is liable under the bond. Stroh argues that, following our holdings in *Reese v. State*, 106 N.M. 505, 506, 745 P.2d 1153, 1154 (1987), and *Moya v. Catholic Archdiocese*, 107 N.M. 245, 248, 755 P.2d 583, 586 (1988), the law of the case doctrine in New Mexico cannot be used "where the former appellate decision was clearly, palpably, or manifestly erroneous. . . ." (quoting *Reese*, 106 N.M. at 507, 745 P.2d at 1155). Under the supremacy clause of the United States Constitution, Stroh argues, we must follow the mandate of *Healy II* in holding the 1979 law invalid, and thus absolve Stroh from any liability under the bond.

The Director counters by arguing that under the Supreme Court's recent holding in *American Trucking Associations v. Smith*, 495 U.S. —— (1990), *Healy II* should not be given "retroactive effect." Consequently, the Director argues, our prior ruling on the 1979 law in *United States Brewers Ass'n* is the law of the case and must be given effect now, regardless of any subsequent invalidation of the 1979 law by *Healy II*.[9] The Director also urges a different reading of New Mexico law of the case doctrine than that asserted by Stroh. By that doc-

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[8] Stroh asserts that the trial court's ruling to the effect that the 1979 law "provided a continuing basis for Stroh's liability . . . through February 21, 1985[,]" can only mean that the trial court accepted the Director's argument that the 1979 law revived after the 1981 law was found unconstitutional. The Director's argument can have merit only if the repealing section of the 1981 law did not fall with the price affirmation requirement of that law. See *supra* note 3, at 3.

[9] The Director reluctantly concedes that "the 1979 law could probably fail under *Healy II*."

trine, the Director argues, we correctly decided *United States Brewers Ass'n* based on *Seagram*, the applicable governing precedent at the time of our decision. Hence, our decision in the case, establishing the law of the case, was not "clearly, palpably or manifestly erroneous or unjust."

While the statement of this case has been difficult, our resolution of it is relatively simple. It is clear that *Healy II* has in effect "finally invalidated" the 1979 law. Yet, there is nothing in the *Healy II* opinion to indicate that the holding is to have retroactive effect. To the contrary, the court stated that *Seagram* "is no longer good law," 491 U.S. at 343, which is the language of prospectivity, not retroactivity.

Second, while we agree with Stroh that *American Trucking Assn's v. Smith* is not on all fours with the instant case, nonetheless we can glean valuable instruction from that case to guide us in resolving the case at bar. For our purposes, the important point about *American Trucking* is that it did not overrule *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). On the contrary, the Court in *American Trucking* used the decision in *Chevron* to reach its conclusion. *See American Trucking*, 495 U.S. at ——.

Reading *Chevron* in the light of *American Trucking*, we make the following conclusions as to the nonretroactive effect of *Healy II*. *Chevron's* first criterion for nonretroactivity is: "[T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106 (citations omitted). In *Healy II* the court held, "[T]o the extent that *Seagram* holds that retrospective affirmation statutes do not facially violate the Commerce Clause, it is no longer good law." 491 U.S. at ——.

As noted *supra* note 7, at 4, the parties disagree over whether the 1981 law was prospective or concurrent. Clearly the 1979 law was retrospective. The United States District Court for the District of New Mexico, in invalidating the 1981 law, considered the 1981 law concurrent, but opined that *any* price affirmation statute, however characterized, would be unconstitutional. *Brown-Forman Corp. v. New Mexico Dep't of Alcoholic Beverage Control*, 672 F. Supp. 1383, 1385-86 (D.N.M. 1987).

We do not read the court's statement in *Healy II*, "[T]o the extent that *Seagram* holds that retrospective affirmation statutes do not facially violate the Commerce Clause, it is no longer good law," 491 U.S. at ——, as meaning that some other type of price affirmation statute would be valid. The court's reasoning in *Healy II* swept a broad scythe of invalidity under the roots of *all* pricing affirmation statues. *See, e.g., Healy II*, 491 U.S. at —— n. 15, (quoting with approval the results of scholarship confirming that both prospective and retrospective price affirmation statutes unduly burden interstate commerce).

Merely because *Seagram* was involved only with a retrospective statute, we do not hesitate to conclude that the 1981 law, however it may be characterized (concurrent versus prospective), was swept away in the flood that washed *Seagram* from the shores of still valid decisions. Therefore, for purposes of the first criterion of *Chevron's* nonretroactivity test, *Healy II* established a new principle of law.

The second *Chevron* criterion requires more analysis. By that criterion, the court stated, "'[W]e must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and affect, and whether retrospective operation will further or retard its operation.'" 404 U.S. at 106-07 (quoting *Linkletter v. Walker*, 381 U.S. 616, 629 (1985)). *Linkletter* was a criminal case in which the issue was whether the court's newly announced rule in *Mapp v. Ohio*, 367

U.S. 643 (1981) (exclusion of evidence seized in violation of Fourth Amendment) was to be applied retrospectively. The court in *Linkletter* answered in the negative.

The court reasoned that "*Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. . . . We cannot say that this purpose would be advanced by making the rule retrospective." 381 U.S. at 836-37. In making this determination, the court looked to the practical effects that a retroactive application of *Mapp* would have.

> The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. Nor would it add harmony to the delicate state-federal relationship of which we have spoken as part and parcel of the purpose of *Mapp*. Finally, the ruptured privacy of the victims' homes and affects cannot be restored. Reparation comes too late.

Id. at 837.

Having read *Chevron* in the light of *Linkletter*, we next factor in the court's explanation of *Chevron's* second criterion as expressed in *American Trucking*. There the court stated, in determining whether the second criterion applied in that case:

> [T]he purpose of the Commerce Clause does not dictate retroactive application of [*American Trucking Assn's v. Scheiner*, 489 U.S. 266 (1987)], since such application would not tend to deter future free trade violations by the States. The [highway-use equalization tax at issue in *American Trucking Assn's v. Smith*] when enacted was entirely consistent with the [Court's prior cases allowing the tax], and it is not

the Clause's purpose to prevent legitimate state taxation of interstate commerce.[10]

495 U.S. at ——.

Applying the court's construction of the second criterion for nonretroactivity as considered and applied in *Chevron*, *Linkletter*, and *American Trucking Assn's v. Smith*, we conclude that retroactive application of *Healy II* to the case at bar would serve no purpose advanced by the Commerce Clause. Especially in New Mexico, price affirmation requirements as they apply to beer have been essentially a dead letter since June 14, 1985. *See supra* note 5, at 3. No purpose of the Commerce Clause would be served by retroactively applying *Healy II* at this late date, as such application, to paraphrase *American Trucking Assn's v. Smith*, "would not tend to deter future [acts of discrimination against interstate sellers of beer], and it is not the Clause's purpose to prevent legitimate [state regulation of] interstate commerce." 495 U.S. at ——.

As the court reasoned in *Linkletter*, the damage done by *Seagram*, which upheld New York's retrospective price affirmation law, cannot now be undone. In overruling *Seagram*, the court in *Healy II* addressed itself, for our purposes, to a twofold evil: (1) potential and incidental involvement by one state in another state's pricing laws,

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[10] In *American Trucking Assn's. v. Smith*, 495 U.S. —— (1989), the truckers sought a refund of a highway-use equalization tax imposed by the state of Arkansas following the court's invalidation of unapportioned flat taxes in *American Trucking Assn's. v. Scheiner*, 483 U.S. 266 (1987). In *American Trucking Ass'ns. v. Smith*, the court, in a four-vote plurality opinion in which Justice Scalia concurred on other grounds, held that *Scheiner* did not have retroactive application, relying on the three criteria enunciated in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Heretofore in our opinion, "*American Trucking*" has meant *American Trucking Assn's. v. Smith*. From this point on in our opinion, we will distinguish between the two American trucking cases by including the respective names of the adverse parties, Smith or Scheiner, as appropriate.

or "price gridlock," as the court called it, 491 U.S. at ——, and (2) "discrimination against brewers and shippers of beer engaged in interstate commerce." *Id.* at ——. The practical effect of these evils cannot now be alleviated; nor would a retroactive application of *Healy II* prevent such evils in the future. Consequently, applying *Healy II* retroactively would advance no purpose served by the Commerce Clause. We thus hold that *Chevron's* second criterion has been satisfied.

We turn now to *Chevron's* third criterion. In the present case, a number of other brewers have already settled the cases against them and have presumably paid penalties. To permit Stroh to be the only brewer to have evaded the strictures of the 1979 law would likely subject the Director to charges that he has dealt with these brewers inequitably. This could well result in the same potential threat that caused the court in *American Trucking Assn's v. Smith* to deny full retroactivity to its *Scheiner* holding. *See American Trucking Assn's v. Scheiner*, 483 U.S. 266 (1987). In *American Trucking Assn's v. Smith*, the Court feared that a full, retroactively applied refund "could deplete the state treasury, thus threatening the State's current operations and future plans . . . [and could lead to] potentially significant administrative costs." 495 U.S. at ——.

While the threat to the state's purse may not be as significant here, the important point is that to single out Stroh for preferred treatment by holding *Healy II* retroactive only as to Stroh, would undoubtedly produce inequitable results and subject the State of New Mexico to liability. The Court's decision in *McKeason Corp. v. Division of Alcoholic Beverages and Tobacco*, 495 U.S. —— (1990) suggests that a state in New Mexico's position here may be liable to all those affected by its erroneous administration of a statute that has been found violative of the Commerce Clause and by its collection of any penalties thereunder, whether through settlement or otherwise.

Hence, we are justified, as was the Court in *American Trucking Assn's v. Smith*, to regard any retroactive application of *Healy II* as potentially productive of both inequitable results and harm to the State of New Mexico, thus calling for nonretroactive application, under *Chevron*, of the *Healy II* holding.

By the same token, we are justified in rejecting the suggestion that our holding in *United States Brewers Ass'n* "was clearly, palpably, or manifestly erroneous or unjust." *See Moya*, 107 N.M. at 248, 755 P.2d at 586. Thus, even if, as Stroh suggests, *Moya* and *Reese* carve exceptions out of established law of the case doctrine, we do not find that such exceptions apply here. The reason is simple. Neither our decision in *United States Brewers Ass'n*, nor the trial court's ruling appealed in that case, were "clearly, palpably, or manifestly erroneous," as the Supreme Court itself has only just held that *Seagram* is no longer good law. How could a decision based on the right law at that time now be a "manifestly erroneous" decision?

Further, neither our decision in *United States Brewers Ass'n*, nor the trial court's ruling appealed in that case, have produced an unjust result, when measured against the treatment accorded to the other brewers whose conduct was censured by the 1979 law. On the contrary, as we have reasoned above in our consideration of *American Trucking Assn's v. Smith*, to deny law of the case finality to *United States Brewers Ass'n* would *produce* an injustice rather than *undo* one.

It should be kept in mind that exceptions to law of the case doctrine that are based on the "clearly erroneous" concept are usually relied on to reverse or set aside a previous decision. *See, e.g.*, Note, *Successive Appeals and the Law of the Case*, 62 Harv. L. Rev. 286, 288 (1948) ("[A]ll courts would probably reverse the prior ruling if convinced that it stated a bad rule of law and should be overruled"). Such is not the question before us. There is no question but that *United States Brewers Ass'n* is now

"bad law." Yet, the question before us is not whether that decision should be reversed or set aside, but whether the decision's error has retroactive significance under the facts of this case. We hold that it does not.

Therefore, under the law of this case, *Healy II* does not invalidate the 1979 law. As the trial court correctly ruled, the law of this case is that dictated by our holding in *United States Brewers Ass'n* and the underlying trial court decision appealed in that case. The recent case of *James B. Beam Distilling Co. v. Georgia*, 59 U.S.L.W. 4735 (June 20, 1981), notwithstanding, which we find inapplicable, we affirm the judgment below on the central issue discussed above.

We have reviewed Stroh's contentions as to damages and the repeal of the 1979 law and conclude that its contentions on those issues are without merit. Thus we affirm the trial court's judgment in its entirety.

IT IS SO ORDERED.

/s/ Dan Sosa, Jr.
DAN SOSA, JR.
Chief Justice

WE CONCUR:

/s/ Joseph F. Baca
JOSEPH F. BACA
Justice

/s/ Gene E. Franchini
GENE E. FRANCHINI
Justice
Specially Concurring

RICHARD E. RANSOM
Justice
Dissenting

SETH D. MONTGOMERY
Justice
Dissenting

FRANCHINI, Justice, (specially concurring).

I concur entirely in the rationale and result of Chief Justice Sosa's opinion. I write specially only to dispel any conjecture that the recent decision of the United States Supreme Court in *James B. Beam Distilling Co. v. Georgia*, 59 U.S.L.W. 4735 (June 20, 1991), in any way modifies or nullifies today's decision. The matter before this court is distinguishable from *Beam* in several respects.

In *Beam*, the Court considered the retroactive application of *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), to an action by a manufacturer of Kentucky Bourbon for a refund of taxes paid under a Georgia state law in effect prior to the *Bacchus* decision. Framing the question before it as "whether it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so[,]" *Beam*, 59 U.S.L.W. at 4738, the Court read *Bacchus* to hold that as to choice of law, its rule was to apply retroactively and deemed it inappropriate to deviate from that rule.

Here, we consider whether *Healy v. Beer Institute*, 491 U.S. 324 (1989) (*Healy II*), should be given retroactive effect. Chief Justice Sosa observes that "there is nothing in the *Healy II* opinion to indicate that the holding is to have retroactive effect." *supra* at 6. *Healy II* is void of the indications of retroactivity that the Court found in *Bacchus*, thus inviting an analysis in this case distinct from the constrained analysis imposed in *Beam*.

Further, the Court concedes that "[t]he grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Beam*, 59 U.S.L.W. at 4739. Procedurally, the posture of the case before us is distinct from *Beam*. The petitioner in *Beam* brought its action in the wake of the *Bacchus* decision rendered in 1984, and

had been involved in no litigation nor been subject to any decisions rendered regarding the challenged tax. The matter before us today has been in litigation since 1979, and Stroh is subject to our decision in *United States Brewers Association v. Director of N.M. Department of Alcoholic Beverage Control*, 100 N.M. 216, 668 P.2d 1093 (1983), *appeal dismissed sub nom. United States Brewers Association v. Rodriguez*, 465 U.S. 1093 (1984), which we find to be controlling here as the law of the case. Application of the law of the case doctrine in this matter places this case squarely in the context of those cases beyond the narrow scope of the *Beam* decision.

The appropriate analysis here is the three-pronged criteria developed in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). The Court declines to apply the *Chevron* analysis in *Beam* claiming that "principles of equality and stare decisis here [prevail] over any claim based on a *Chevron Oil* analysis." *Beam*, 59 U.S.L.W. at 4738. Significantly, *Beam* does not overrule *Chevron*. Given the prospective nature of *Healy II*, and the distinct procedural posture of *Strohs* in this case, *Beam's* rejection of the *Chevron* analysis in no way undermines the validity of the decision we render today. I therefore specially concur.

/s/ Gene E. Franchini
GENE E. FRANCHINI
Justice

MONTGOMERY, Justice (Dissenting).

The question in this case is whether the plaintiff, Stroh, should be held liable on its preliminary injunction bond. That depends, of course, on the wording of the condition in the bond triggering the principal's (Stroh's) liability. As quoted in the majority opinion, the condition is that "it . . . be finally decided by the Court that [the 1979 law] is valid . . . ." The district court twice decided the law was valid; this Court affirmed one of those decisions; and the question before us now is whether the second decision should be affirmed or should be reversed on the ground that, after all, the 1979 law is not and was not valid.

The majority opinion answers this question in ways that I find wholly unsatisfactory. The majority ignores the purpose of a preliminary injunction bond, indemnifying the Director and the wholesalers from harm they have not suffered and penalizing Stroh for conduct that was entirely lawful and appropriate. The majority reveals a view of the law that I believe is fundamentally wrong and unrealstic. It misapplies the law of the case doctrine, in the face of supervening federal law and in violation of the Supremacy Clause of the Constitution, and decides an issue of federal law—the "retroactivity" of a decision by the United States Supreme Court—in a way that is contrary to any reasoned application of controlling Supreme Court precedents on the retroactivity question. For all of these reasons, I respectfully dissent.

I.

One way to approach the question before us is to consider the purpose of a preliminary injunction bond. Under our Rule 1-088(C), a preliminary injunction bond is given "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained . . ." SCRA 1986, 1-086(C). Wright and Miller, describing the correspond-

ing federal rule, Fed. R. Civ. P. 65(c), state that the purpose of the rule "is to enable a restrained or enjoined party to secure indemnification for the costs . . . and pecuniary injury that may accrue during the period in which a wrongfully issued equitable order remains in effect." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2954, at 523 (1973). This gives rise to two further questions: whether the preliminary injunction was wrongfully issued and whether the Director (or anyone else) suffered a pecuniary injury during the period in which the injunction remained in effect.

A conclusion that the Director was wrongfully enjoined in 1979 can only be reached by taking the position that Stroh's conduct during the pendency of the injunction was contrary to law and that the Director had every right to enforce the statute. Similarly, to say that the Director (or the beer wholesalers, or beer retailers, or beer-consuming public) suffered a pecuniary injury during the 1979-85 period entails the proposition that the 1979 law was valid at that time and somehow became invalid later on when, in 1989, the Supreme Court decided *Healy II*.[1] While it may be begging the question to frame the issue in these ways, doing so highlights for me the illogic and injustice of the majority's position that Stroh's conduct, which was perfectly consistent with the Commerce Clause in the Constitution as now authoritatively construed, was somehow wrongful and should not have been undertaken.

Healy II construed the Commerce Clause to mean that, in the present context, state price-affirmation laws like the 1979 law impermissiby burden interstate commerce. Here was a company that took the same position from the very beginning, insisting that the law of this state (and many other states like it) could not require the company to sell its beer at a particular price pegged to the price in other states. The company's position was

[1] *Healy v. Beer Inst.*, 491 U.S. 324 (1989).

consistent with the mandate of the Constitution, and the company proceeded to sell its beer for whatever price it determined in the market. So did all the other brewers, at least as far as we are informed on this appeal. The other brewers ultimately decided that they wanted to buy their peace and get out of the litigation, so they paid some money to the state and then (since the law had been repealed) continued to sell their beer as they had before. Stroh, however, had the courage of its convictions and continued to assert the invalidity of the law, even though it had been upheld by this Court. Events proved that this Court had been wrong and Stroh had been right. Stroh had acted consistently with the Constitution and its conduct had conformed with the policy implemented in the Commerce Clause. To hold now that Stroh should be penalized for this conduct is, to my way of thinking, seriously inconsistent with the constitutional policy spelled out in *Healy II*.[2]

Not only does the majority opinion penalize Stroh for conduct that turned out to be completely lawful; it awards a windfall to both the Director and the wholesalers that I believe is entirely unjustified. The Director had no statutory entitlement to collect money (damages, reparations, penalties, or anything else) from a brewer who did not comply with the price-affirmation law. *See* NMSA 1978, § 60-12-9 (Orig. Pamp.) (repealed July 1, 1981) (violation of Discrimination in Selling Act is violation of Liquor Control Act; violator is also liable for suspension of license); NMSA 1978, § 60-10-39 (Orig. Pamp.) (repealed July 1, 1981) (violation of Liquor Control Act is misdemeanor punishable, if violator is corporation, by

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[2] The Supreme Court said, for example: "[T]he practical effect of this affirmation law, in conjunction with the many other beer pricing and affirmation laws that have been or might be enacted throughout the country, is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude." *Healy II*, 491 U.S. at 337.

fine of not more than $1,000).[3] The parties agreed to a bond as a condition for issuance of the preliminary injunction, but there was not potential liability to the Director secured by the bond; it was simply the *quid pro quo* for the Director's agreeing to the injunction.

As for the wholesalers, they became entitled to a share of any potential bond proceeds as the result of a deal they made with the Director, after they intervened, to divide any proceeds Stroh might have to pay under the bond. Absent the bond, the wholesalers would not have been entitled to collect money from Stroh by virtue of any statutory remedy; they could have had to sue for damages resulting from Stroh's charging a price higher than that prescribed by the 1979 law. Since, as things turned out, Stroh was charging a price *permitted* by federal law, the wholesalers were not harmed and cannot—in any meaningful sense, apart from the law's having previously (and erroneously) been declared "valid"—claim to have suffered any damages.

II.

The majority opinion displays a view of the nature of the law that I find altogether unacceptable. That is, the majority opinion treats "the law" as it "existed" in 1979-85 as some kind of immutable object, something like an architect's blueprint—"a Platonic or ideal existence" [4]—against which parties' conduct is to be measured to see whether that conduct was right or wrong. According to this view, "the law" contained in *Seagram* [5] on the con-

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[3] The Director apparently did not know what to do with the money collected from the other brewers when they settled with him, so the settlement agreements provided simply that the settlement proceeds were to be held in trust by the Attorney General and distributed "for the benefit of the citizens of New Mexico as the Attorney General may deem appropriate."

[4] *Great Northern Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 365 (1932) (Cardozo, J.).

[5] *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966).

stitutionality of price-affirmation statutes made our own 1979 price-affirmation statute constitutional, Stroh's conduct unlawful, and the order enjoining the Director wrongful. When *Healy II* was decided, "the law" was changed—the dimensions and shape of the blueprint were altered—so that, when assessed under the new configuration, Stroh's position suddenly became correct, even though it previously had been incongruent with the shape of "the law" as it stood prior to *Healy II*.

I cannot accept this reified conception of "the law" as something that has one shape one day and another the next. The law is not a "brooding omnipresence in the sky,"[6] nor is it something chiseled into stone tablets somewhere. It is a set of precepts—of rules, principles, maxims, guidelines—that *do* change from time to time and that govern the conduct and relationships of citizens. The task of lawyers and judges is to determine which of these changing precepts should be applied to the resolution of a particular dispute and which should not—hopefully for good, policy-based reasons.

The precept laid down by *Seagram* was that price-affirmation laws were permissible. No one would think of applying this precept today; it has been overruled by *Healy II*. The precept in the latter case is that another, overarching precept—the "negative implication" of the Commerce Clause—forbids this kind of statute. Whether we should apply the *Healy II* and Commerce Clause precepts depends on how we view certain other precepts, namely, those predicated on principles of finality, as embodied here in the law of the case doctrine, and those prescribing when a new decision should or should not be given "retroactive" effect.

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[6] *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

III.

Turning to the law of the case, I certainly agree that principles of finality of litigation are important and should be applied in the resolution of a dispute—except when there is good reason not to do so. The law of the case doctrine prevents relitigation of issues already determined; the policy underlying the doctrine is to conserve judicial and litigants' resources by avoiding repetitious litigation. In this case the doctrine does not apply, because no one is attempting to relitigate whether the 1979 law is or is not invalid under the Constitution. All parties concede, as they must, that price-affirmation statutes like the 1979 law are invalid.[7] The only question is whether, despite this concession, the 1979 law should be deemed valid now because we held it valid before. In this situation, where a controlling decision by the United States Supreme Court on a matter of federal constitutional law has intervened since our previous decision, I believe that the discretionary policy embodied in the law of the case doctrine should not be invoked on a subsequent appeal in the same case as the one in which the original, erroneous decision was announced.

As we said in *Reese*,[8] in an opinion by Chief Justice (then Senior Justice) Sosa,

> "The doctrine of the law of the case is not a rule to which we are bound by any legislative enactment. In so far (sic) as we are bound, it is because we have so bound ourselves, or choose so to bind ourselves by our decisions. . . . [W]hen we conclude that a former decision is erroneous, and we will still have the opportunity to correct it as affecting those parties whose interests are concerned in the original ruling, we should apply the law of the land rather than the law of the case. . . . [W]e feel that it is

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[7] See the majority opinion, *ante*, footnote 9.

[8] *Reese v. State*, 106 N.M. 505, 745 P.2d 1153 (1987).

> better and more just to apply in this case what we find to be the law of the land."

106 N.M. at 506, 745 P.2d at 1154 (quoting *Farmers' State Bank v. Clayton Nat'l Bank*, 31 N.M. 344, 355-56, 245 P. 543, 548 (1925)). We went on to say that this was "in keeping with the majority understanding of the doctrine of the law of the case," which we summarized as follows:

> "[S]ince the doctrine of the law of the case is merely one of practice or court policy, and not of inflexible law, so that appellate courts are not absolutely bound thereby, but may exercise a certain degree of discretion in applying it, there are many holdings in which the courts have retreated from any inflexible rule requiring the doctrine to be applied regardless of error in the former decision, and it has been said that the doctrine should not be utilized to accomplish an obvious injunctice, or applied where the former appellate decision was clearly, palpably, or manifestly erroneous or unjust."

Id. at 507, 745 P.2d at 1155 (quoting 5 Am. Jur. 2d *Appeal and Error* § 750, at 194 (1962)).

Finally, we said:

> It is obvious from the above that we may deviate from the law of the case doctrine in the situation before us if to apply the doctrine would result in a manifest injustice.

Id.; *see also Moya*,[9] 107 N.M. at 248, 765 P.2d at 586 ("[W]e will not apply that judicial doctrine [law of the case] here, where doing so might result in a manifestly unjust decision and where the essential facts have been altered by a substantial change in the evidence.").

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[9] *Moya v. Catholic Archdiocese*, 107 N.M. 245, 755 P.2d 683 (1988).

Here, there has not been a "substantial change in the evidence"; there has been a substantial—indeed, a dispositive—change in the law. Applying the law of the case doctrine is, I believe, manifestly unjust.

To answer the majority's rhetorical question, "How could a decision based on the right law at that time now be a 'manifestly erroneous' decision?," I would point out, first, that the question further illustrates the law-as-an-object view criticized above. The "right law" in 1983, when our previous decision was rendered, was not some unchanging corpus of "the law"; it was a correct application of the then controlling constitutional precept handed down in *Seagram*. But it was nonetheless erroneous—"manifestly erroneous," if you will—because *Seagram* turned out to be wrong and Stroh, who lost in 1983, turned out to be right. To say that this Court's previous decision was wrong is not a criticism of the Court in 1983; it is simply an acknowledgement that sometimes courts reach erroneous decisions by relying on erroneous precedents. This Court cannot, or should not, be faulted for lacking omniscience in 1983, but our lack of prescience then should not be turned into a reason now for refusing to acknowledge what has happened since and for holding that Stroh—even though it was right all along and ultimately was vindicated by the United States Supreme Court—has to pay nearly 20 million dollars for the privilege of being right.

IV.

The majority holds that Stroh is liable on its bond and offers as the primary reason for this result the proposition that *Healy II* should not be applied retroactively. Once again, this illustrates the vigor with which the majority is willing to apply the reification theory discussed above: "The law" as it stood in 1983 validated state price-affirmation statutes; in order for a statute like the 1979 law to be declared now to have been invalid then, it is necessary to hold that the new decision (*Healy II*)

reached back in time and wrought some kind of change in the old law so as to render the statute invalid instead of valid.[10] But we are deciding this case *today*, not in 1983, and not in 1966 when *Seagram* was decided. We should apply today's precepts today—unless there is some good reason for not doing so. To refuse to apply the precept of *Healy II* because it was not announced until after the statute was repealed in 1985 is simply another application of the approach that "the law" has a certain shape at any given time and that shape cannot be changed by a subsequent event unless that event has "retroactive" effect.

But it is not necessary to philosophize about the nature of the law to reach the conclusion that *Healy II* should be given retroactive effect in this case; that conclusion follows readily from conventional analysis using accepted forms of legal reasoning. First, the Supreme Court has not held that its decision in *Healy II* is prospective only; in context, the quotation in the majority opinion (*Seagram* "is no longer good law") simply means that, in light of the history recounted in the Supreme Court's opinion, the decision in *Seagram* had to be overruled. Since the question of the retroactivity or nonretroactivity of a Supreme Court decision is an issue of federal law, *James B. Beam Distilling Co. v. Georgia*, —— U.S. ——, ——, 111 S.Ct. 2439, 2443 (1991) (opinion of Souter, J.), I agree

[10] The anomaly in this assertion was manifested by the Director's position in the court below, in which he *conceded* that the 1981 law was unconstitutional and yet, in practically the same breadth, argued that the 1979 law was valid! He took this glaringly inconsistent position because, by affirming the invalidity of the 1981 law with its 1979-law repealer, he could claim that the earlier law remained in effect until its later repeal in 1985 and thus, as the district court ruled, "provided a continuing basis for Stroh's liability." Like the majority, I do not reach the questions whether the severability clause in the 1981 law left the repealer intact and whether, assuming the later law was invalid, the earlier law "revived" when the later law fell. For all practical purposes, as reflected in both the majority opinion and this dissent, Stroh's liability under its bond is the same under either the 1979 law or the 1981 law.

with the majority's implicit recognition that this is a point on which the Supreme Court has the last say; but I do not think it has said anything up to now. *This Court* is deciding this issue of federal law; and, with all respect, I think the majority decides it incorrectly.

Judicial decisions interpreting the Constitution, like most judicial decisions, are usually given retroactive effect. *Id.* at ——, 111 S.Ct. at 2443; *United States v. Johnson*, 457 U.S. 537, 542 (1982) ("Before 1965, . . . 'both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court . . . subject to [certain] limited exceptions.'") (quoting *Robinson v. Neil*, 409 U.S. 505, 507 (1973)). Nevertheless, in civil cases there are situations in which a decision interpreting the Constitution will not be applied retroactively. *Chevron Oil Co. v. Huson*[11] lays out the factors or criteria to be utilized in determining when a decision will not be so applied. As Justice Franchini points out in his special concurrence, *Chevron Oil* was not overruled in the very recent decision in *Beam*. However, and with utmost respect, I believe that Justice Franchini is seriously mistaken, as is the majority,[12] in his attempt to dispel any "conjecture" that *Beam* supports a result contrary to the one announced by the majority.

Although there was no majority opinion in *Beam*, six of the nine Justices voted to hold the earlier decision in *Bacchus*[13] retroactive to disputes arising and conduct occurring before the date of that decision. Justice Souter,

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[11] 404 U.S. 87 (1971).

[12] The majority's reliance on *Linkletter v. Walker*, 381 U.S. 618 (1965), is puzzling. The rationale of that case was severly undercut in *Griffith v. Kentucky*, 479 U.S. 314 (1987), in which the Court held that a new constitutional rule, in criminal cases, applies retroactively to all cases pending on direct review or not yet final. *See id.* at 320-22.

[13] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

writing for himself and Justice Stevens, took the position that principles of equality and *stare decisis* dictated application of a new rule, applied to the litigants in the case in which the rule is announced, to other, similarly situated litigants whose conduct antedated announcement of the new rule. They thus rejected the concept of "modified" or "selective" prospectivity. (They refused, however, to "speculate as to the grounds or propriety of pure prospectivity." —— U.S. at ——, 111 S.Ct. at 2448.) Since the parties' conduct in *Healy II* occurred in 1981-84 and that of the litigants in this case in 1979-85, applying the rule in *Healy II* to the former set of litigants but not the latter would appear to work just the kind of discrimination disfavored by Justices Souter and Stevens in *Beam*. I therefore assume that they would apply *Healy II* retroactively in this case to hold that the 1979 law was invalid.

Justice White concurred in the judgment in *Beam*, agreeing with Justice Souter that the litigants in *Beam* should have the benefit of the same rule as those in *Bacchus*, but he reaffirmed his view that "pure" prospectivity is proper in some cases, *Id.* at ——, 111 S.Ct. at 2449. Justices Blackmun, Marshall, and Scalia also concurred in the judgment, expressing the view that both selective prospectivity and pure prospectivity are beyond the Court's power, *id.* at ——, 111 S.Ct. at 2451—that *all* decisions adjudicating a constitutional controversy should be applied retroactively.

The dissent in *Beam*, authored by Justice O'Connor and joined by Chief Justice Rehnquist and Justice Kennedy, would have applied the *Chevron Oil* analysis in deciding the retroactivity question before them. But the dissent's reasoning in *Beam*, consistent with Justice O'Connor's approach in *American Trucking Ass'ns v. Smith*,[14] placed considerable—indeed, to my mind, controlling—emphasis in reaching this result on the desirability of respecting

[14] 498 U.S. ——, 110 S.Ct. 2323 (1990).

parties' reliance on an old rule of law and not upsetting settled expectations that may have arisen based on the old rule. In the present case, as I shall explain below in connection with *American Trucking Ass'ns v. Smith*, this factor of reliance—of respecting settled expectations that may have grown up around *Seagram*—is altogether lacking. I surmise, therefore, that the dissenters in *Beam* (who, with Justice White, also composed the plurality in *Smith*) would apply the usual rule of full retroactivity in this case and find any exceptions, predicated on *Chevron Oil*, inapplicable.

As to *Chevron Oil*, I concede that two of the three factors it prescribed for determining when a new rule will be given prospective-only effect are partially satisfied by *Healy II*: The case did establish a new principle of law by overruling clear past precedent, and (since our price-affirmation laws were repealed in 1986) retrospective application of *Healy II* will not have any particular effect in furthering or retarding operation of the rule in that case (that price-affirmation laws act as an impermissible burden on interstate commerce). However, *Chevron Oil*'s first factor is not fully satisfied, because the element of the parties' reliance is missing. *See* 404 U.S. at 106 ("[T]he decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent *on which litigants may have relied* . . . .") (emphasis added). Likewise, I cannot concede that *Chevron Oil*'s second factor is fully satisfied, because, while holding Stroh liable on its bond may not deter other states from enacting price-affirmation laws, such action is flatly inconsistent with the policy expressed in the Commerce Clause as construed in *Healy II*.

It is over the third *Chevron Oil* factor, however, that I disagree most strenuously with the majority opinion. That third criterion is "the inequity imposed by retroactive application . . . [in order to avoid] the 'injustice or hardship' by a holding of nonretroactivity." 404 U.S. at

107. In *Chevron Oil*, the plaintiff at least arguably had relied on the then current law in failing to file suit within the time prescribed by the state statute of limitations that was applicable as a result of a new Supreme Court decision, *Rodrigue v. Aetna Cas. & Sur. Co.*, 396 U.S. 352 (1969). The Court gave *Rodrigue* prospective effect only, because it would have been inequitable to deprive the plaintiff of his cause of action when he relied on the old law in failing to timely file his lawsuit. Similarly, in *American Trucking Ass'ns v. Smith*, the Court held that a decision [15] invalidating a highway use equalization tax would not be applied with full retroactivity, because "invalidation of the State's HUE tax would have potentially disruptive consequences for the State and its citizens." 496 U.S. at ——, 110 S.Ct. at 2333. Justice O'Connor's plurality opinion focused on the possibility that retroactive invalidation of the tax might, if a refund were required, "deplete the state treasury, thus threatening the State's current operations and future plans," and entail "potentially significant administrative costs.' *Id.* "[T]he inequity of unsettling actions taken in reliance on those precedents [*i.e.*, previously established precedents overruled by a later decision] is apparent." *Id.* Justice O'Connor employed the same rationale in her dissent in *Beam*. *See* —— U.S. at ——, 111 S.Ct. at 2452 ("By not applying a law-changing decision retroactively, a court respects the settled expectations that have built up around the old law.").

This factor is altogether absent in the present case. At oral argument, counsel for the Director conceded that the *only* instance of reliance in this case was that our state legislature presumably relied on *Seagram* in enacting the 1979 law. (And, of course, this Court relied on *Seagram* in upholding that law.) But I do not believe that the reliance of a legislative body (or a court) is the kind of reliance *American Trucking* is talking about. In protect-

[15] *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987).

ing the reliance interests of parties to a transaction or a lawsuit—in refusing to upset settled expectations of litigants or others—the courts are concerned about protecting the rights (or interests, or hopes, or desires) of the parties to a transaction or a dispute, which may include governmental bodies but does not include (except as reflected in actions taken in reliance on a former law, such as collection of taxes) law—prescribing assemblies or tribunals.

As I have said, there is no suggestion in this case that anyone relied on the 1979 price-affirmation law in doing anything. Stroh's predecessor sued for a declaration that the law was invalid; the Director defended; the parties worked out an agreement under which the Director would not enforce the law pending a determination of its validity and on condition that the plaintiffs would pay the difference between what they might charge under the injunction and what they could charge under the law if it were valid. No one changed his, her, or its conduct in reliance on anything that anyone else did—except, of course, that the wholesalers paid the brewers more for beer than they would have paid in the absence of the injunction, assuming the law was valid. All of this is long past; the law was repealed after a few years and ultimately held *not* valid, and so it turned out that the wholesalers paid a permissible price for their beer, even though they still complain that the price charged by the brewers in the 1979-85 timeframe was in some way unfair.

None of this is reviewed or analyzed by the majority in any way. Instead, the opinion offers the wholly speculative possibilities (1) that the wholesalers who decided to settle rather than litigate would somehow be treated unjustly if Stroh's position that the 1979 law was invalid were now upheld by this Court, and (2) that the state might somehow be liable to the settling wholesalers if, notwithstanding the fact that the 1979 law is now clearly invalid, Stroh were exonerated from liability on its bond.

I reject as entirely unfounded the notion that the state could incur any liability whatsoever to the brewers who settled their potential liability under the preliminary injunction bonds by paying money to the state in exchange for a release from any further liability and in order to avoid the expenses, hazards, and inconveniences of continued litigation. The *McKesson* case [16] does not even come close to suggesting that such a settlement (especially where, as here, the state has no authority under the statute to collect any money from the settling parties in the first place) might give rise to liability on the part of the state or otherwise result in inequitable consequences to other parties. As for those other parties, I regard it as highly dubious to suggest that parties who voluntarily settled litigation to get a contingent liability off their books (and for whatever other reasons they may have settled) would somehow be treated unfairly if we recognized that the party who persisted in its constitutional challenge and who ultimately was vindicated was not liable for the penal sum in its bond.

V.

In the words of both *Moya* and *Reese*, the majority has reached a result that is "manifestly unjust." It has done so by declaring that a statute, the 1979 law—which the majority itself says has clearly been "finally invalidated" by an intervening decision of the United States Supreme Court—is and was valid because we previously ruled it so, even though "[t]here is no question but that [our prior ruling] is now 'bad law.'" By so holding, the majority not only misapplies the law of the case doctrine; it does so in a way that contravenes supervening federal law and thus violates the Supremacy Clause of the Constitution. *See Henry v. City of Rock Hill*, 376 U.S. 776 (1964); *Cooper v. Aaron*, 358 U.S. 1 (1958); *State v. Lewis*, 543

[16] *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 498 U.S. ——, 110 S.Ct. 2238 (1980).

N.E.2d 1116 (Ind. 1989); *Brunner Enters. v. Department of Revenue*, 452 So. 2d 550 (Fla. 1984); *Townsend v. Clover Bottom Hosp. & School*, 580 S.W.2d 523 (Tenn.), *cert. denied*, 438 U.S. 948 (1978).

The majority compounds this error by determining incorrectly a question of federal law: whether the Supreme Court's decision in *Healy II* should be limited to prospective-only effect and not applied in the circumstances of this case. While not a violation of the Supremacy Clause, this is simply an erroneous ruling on an issue of federal law which does a grave injustice to the losing party before us and confers an unwarranted windfall on the parties who have prevailed.

I therefore dissent.

/s/ Seth D. Montgomery
SETH D. MONTGOMERY
Justice

I CONCUR:

/s/ Richard E. Ransom
RICHARD E. RANSOM
Justice

APPENDIX B

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. SF 79-1139(C)

UNITED STATES BREWERS ASSOCIATION, *et al.*,
Plaintiffs,

vs.

DIRECTOR OF THE MEXICO DEPARTMENT
OF ALCOHOLIC BEVERAGE CONTROL,
Defendant.

and

GALLUP SALES COMPANY, *et al.*,
Group II Intervenors

FINAL JUDGMENT

[Filed Sep. 21, 1990]

This Final Judgment supersedes and replaces the Revised Judgment entered herein on October 27, 1989.

The remaining parties in this action, Plaintiff, The Stroh Brewery Company ("Stroh"), Defendant, Director of the New Mexico Department of Alcoholic Beverage Control ("State Defendant"), and the Group II Intervenors, have submitted cross-motions for Summary Judgment in this matter. The parties have extensively briefed the issues and provided the Court with affidavits, depositions and exhibits thereto in support of their various positions. On August 25, 1989, this Court entered its Order

granting the State Defendant's Motion for Summary Judgment. In accord with that Order, the Court makes the following Findings of Fact and Conclusions of Law and enters final judgment herein accordingly.

FINDINGS OF FACT

1. On or about June 14, 1979, Jos. Schlitz Brewing Company, Inc. ("Schlitz"), predecessor to Stroh, duly executed a "Preliminary Injunction Bond" securing to the people of New Mexico the damages they may sustain by reason of the granting of the preliminary injunction entered contemporaneously by this Court and enjoining the enforcement of the Discrimination in Selling Act, §§ 60-12-1—60-12-10 (N.M.S.A. 1978), as amended (the "1979 Law"). In the Preliminary Injunction Bond, Schlitz undertook to pay damages "if, and only if, it should be finally decided by the Court that [the 1979 Law] is valid and the preliminary injunction should not have been entered."

2. The Preliminary Injunction Bond provided that the measure of damages would be the difference between the price at which Schlitz sold beer to wholesalers and distributors in New Mexico during the pendency of the injunction, and the price at which Schlitz would have been required to sell such beer under the terms of the 1979 Law, together with interest thereon, if the Court were to find such interest to be appropriate.

3. The Preliminary Injunction Bond further provided that after entry of final judgment upholding the validity of the 1979 Law, Schlitz would pay the costs of the Attorney General in litigating this matter.

4. On or about July 19, 1983, Stroh and the F.&M. Schaefer Brewery Co. ("Schaefer") duly executed a Supersedeas Bond in consideration of the issuance of a stay pending appeal. In the Supersedeas Bond, Stroh and Schaefer undertook that "if and only if, it should be finally decided by the courts that [the 1979 Law] is valid

and the preliminary injunction and stay should not have been entered" then they would pay, within sixty (60) days after final disposition of the matter, to the State Defendant and the Attorney General of the State of New Mexico: the costs of the Attorney General in litigating the suit; and the amount representing the difference between the prices at which Stroh, Schlitz and Schaefer had sold beer to wholesalers and distributors in New Mexico during the pendency of the injunction and the prices at which they would have been required to sell such beer under the 1979 Law, together with interest on that amount, if the Court found such interest to be appropriate.

5. The 1979 Law was enjoined by this Court as to Stroh, Schlitz, and Schaefer from June 15, 1979 through February 21, 1985.

6. During the period of the injunction, June 15, 1979 through February 21, 1985, Stroh and Schlitz sold beer to wholesalers and distributors in New Mexico at prices in excess of the prices which they were required to sell those same brewed products under the 1979 Law.

7. During the period June 15, 1979 through February 21, 1985 the difference between the prices at which Stroh and Schlitz sold beer to wholesalers and distributors in New Mexico and the prices at which they should have sold such beer in New Mexico was in the amount of $12,070,310.82.

8. On July 14, 1983, the Supreme Court of New Mexico granted the motion of Stroh to substitute itself and Schaefer as plaintiff-appellants in this cause in the place of Schlitz.

9. It does not appear from the 1981 law, §§ 60-8A-12—60-8A-19 (N.M.S.A. 1983) (the "1981 Law"), that the New Mexico legislature intended the repeal in all events of the 1979 Law; and it is evident that the 1981 Law was intended to replace the 1979 Law.

10. On August 12, 1985, State Defendant and Gallup Sales Company, Pecos Sales Company, Pucci Distributing Company and State Beer Distributors, Inc. entered into a settlement stipulation approved by this Court settling the issues between them, and agreeing to divide, as set forth in the agreement, the proceeds and damages recovered in this litigation; and the amount recovered pursuant to this Judgment should be divided accordingly.

11. The expenses of the Attorney General in litigating this matter through September 21, 1990 are stipulated by the parties to be in the amount of $130,641.04.

12. There is no just reason for delay in the entering of this Final Judgment.

CONCLUSIONS OF LAW

1. The 1979 Law was valid under the Constitution of the United States and the Constitution of the State of New Mexico.

2. The decision of the Supreme Court of New Mexico in *The United States Brewers Association, Inc. v. Rodriguez*, 100 N.M. 216, 668 P.2d 1092 (1983), upholding the constitutionality of the 1979 Law is *res judicata* and the law of the case in this matter.

3. The 1979 Law was constitutional and valid and provided a continuing basis for Stroh's liability pursuant to the Preliminary Injunction Bond and the Supersedeas Bond from the period June 15, 1979 through February 21, 1985.

4. The Preliminary Injunction Bond executed by Schlitz and the Supersedeas Bond executed by Stroh and Schaefer are valid and binding agreements and form the basis for the Court's granting judgment against Stroh for damages in this matter.

5. During the period June 15, 1979 through February 21, 1985, Stroh and Schlitz did not comply with the

provisions of the 1979 Law as contemplated by the terms of the Preliminary Injunction Bond and Supersedeas Bond.

6. Under the terms of the Preliminary Injunction Bond and the Supersedeas Bond, Stroh is liable in damages in the amount representing the difference between the prices at which Stroh and Schlitz sold beer to wholesalers and distributors in New Mexico during the period June 15, 1979 through February 21, 1985 and the prices at which they were required to sell beer pursuant to the 1979 Law, together with interest at the legal rate thereon, calculated from the date of noncompliance with the 1979 Law.

7. For the period June 9, 1979 through June 30, 1981, Stroh is liable to the State of New Mexico for damages in the amount of $5,283,849.11, together with prejudgment interest at the legal rate of 6% on that sum in the amount of $3,077,842.10, calculated from the dates of noncompliance with the 1979 Law through March 31, 1989. For the period June 30, 1981 through February 21, 1985, Stroh is liable to the State of New Mexico for damages in the amount of $6,786,461.71 together with prejudgment interest at the legal rate of 6% on that sum in the amount of $2,799,415.45 calculated from the dates of noncompliance with the 1979 Law through March 31, 1989. Stroh is also liable to the State of New Mexico for interest in the amount of $60,351.85 per month on the total principal amount of $12,070,310.82 for each additional month after March 1990 that the principal remains unpaid.

8. Pursuant to the terms of the Preliminary Injunction Bond and the Supersedeas Bond, Stroh is liable to the State of New Mexico for the fees and costs of the Attorney General in litigating this matter.

9. Because the 1979 Law was constitutional, the preliminary injunction should not have been entered in this matter in June 1979.

10. The entire evidentiary basis for the calculation of the difference in prices at which it sold its brewed products to wholesalers and distributors in the State of New Mexico from June 15, 1979 through February 21, 1985 is derived from information and records furnished by Stroh and there are no material facts in dispute with regard to that amount, $12,070,310.82.

11. There are no material issues of fact in dispute in this matter.

12. State Defendant is entitled to judgment as a matter of law.

13. There is no just reason for delay in the entering of this Final Judgment.

In accordance with the above Finding of Fact and Conclusions of Law, the Court enters partial summary judgment in this matter as follows:

JUDGMENT

1. Stroh is liable to the State of New Mexico for damages for the period June 15, 1979 through February 21, 1985, interest thereon, attorneys' fees and costs, recovery thereon to be divided in accordance with the settlement stipulation approved by the Court.

2. Final Judgment is entered in this matter against the Stroh Brewery Company and in favor of the State of New Mexico for $17,947,568.37, representing principal and interest through March 31, 1990; for further interest of $60,351.55 for each month after March 1990 that the judgment remains unpaid and for the expenses of the Attorney General in litigating this matter through September 21, 1990 in the amount of $130,641.04.

3. The Court retains jurisdiction for the purpose of determining the right to and the amount of non-appellate, post-judgment fees and costs of the Attorney General.

4. There is no just reason for delay in the entering of this Final Judgment.

5. The cross-motion of The Stroh Brewery Company for summary judgment is denied.

/s/ Art Encinias
District Judge

SUBMITTED:

/s/ John Bigelow
JOHN BIGELOW
Special Assistant Attorney General

APPROVED AS TO FORM:

JOHN T. PORTER, P.A.

By: /s/ John T. Porter
JOHN T. PORTER
WHITE & CASE
JOHN J. MCAVOY
Attorneys for
The Stroh Brewery Company

/s/ O. R. Adams, Jr.
O. R. ADAMS, JR.
Attorney for
Group II Intervenors

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
Friday, September 13, 1991

No. 19,547

THE STROH BREWERY COMPANY,
Plaintiff-Appellant,

vs.

DIRECTOR OF THE NEW MEXICO DEPARTMENT
OF ALCOHOLIC BEVERAGE CONTROL,
Defendant-Appellee,

and

GALLUP SALES COMPANY, *et al.*,
Intervenors-Appellees.

This matter coming on for consideration by the Court upon Motion of the Appellant for rehearing, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the Motion of Appellant for rehearing is hereby denied.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 19,547

MANDATE

THE STATE OF NEW MEXICO TO THE DISTRICT COURT sitting within and for the County of Santa Fe, GREETING:

WHEREAS, in a certain cause lately pending before you, numbered SF 79-1139(C) on your Civil Docket wherein The Stroh Brewery Company was Plaintiff and Director of Alcoholic Beverage Control was Defendant, by your consideration in that behalf judgment was entered against said Plaintiff; and

WHEREAS, said cause and judgment were afterwards brought into our Supreme Court for review by said Plaintiff by appeal, whereupon such proceedings were had that on August 12, 1991 an opinion was handed down by said Supreme Court and Judgment was entered affirming your judgment aforesaid and remanding said cause to you.

NOW, THEREFORE, this cause is hereby remanded to you for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and said Judgment.

WITNESS, The Hon. Dan Sosa, Jr., Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 13th day of September, 1991.

(SEAL)

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

CONSTITUTIONAL PROVISIONS

1. The Commerce Clause of the United States Constitution provides: "The Congress shall have the power . . . To regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 3.

2. The Case or Controversy requirement of the United States Constitution provides: "The judicial Power shall extend to [specified] Cases [and] Controversies . . . ." U.S. Const. art. III, § 2, cl. 1.

3. The Supremacy Clause of the United States Constitution provides: "The Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ." U.S. Const. art. VI, cl. 2.

APPENDIX E

LAWS OF 1967

CHAPTER 269
SENATE BILL NO. 6
Approved April 4, 1967

AN ACT

RELATING TO ALCOHOLIC LIQUORS; PROHIBITING CERTAIN DISCRIMINATIONS IN PRICING; REQUIRING CERTAIN ACTIONS AND INFORMATION TO BE FILED; AND ESTABLISHING PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.—This act may be cited as the Discrimination in Selling Act.

Section 2. FILING OF SCHEDULES REQUIRED.—No brand of alcoholic liquor shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule is filed with the chief of the liquor control division and is then in effect. For the purposes of the Discrimination in Selling Act, alcoholic liquor means spirituous liquors as defined in Section 46-1-1 New Mexico Statutes Annotated, 1953 Compilation.

Section 3. FORM OF SCHEDULE.—The schedule shall be in writing, duly verified, and filed in the number of copies, form and time as required by the chief of the liquor control division. It shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to wholesalers, the net bottle and case price paid by the seller, which prices, in each in-

stance, shall be individual for each item and not in combination with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any.

Section 4. SELLING TO WHOLESALERS AT PRICES DIFFERENT THAN SHOWN IN SCHEDULE. —The brand of alcoholic liquor shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the chief of the liquor control division is granted for good cause shown and for reasons not inconsistent with the purposes of the Discrimination in Selling Act.

Section 5. FILING OF SCHEDULES.—The schedule shall be filed by the owner of the brand who is the holder of a nonresident license issued by the division of liquor control.

Section 6. FILING OF AFFIRMATION.—There shall be filed in connection with, and when filed shall be deemed part of, the schedule filed for a brand of alcoholic liquor, an affirmation duly verified by the owner of the brand of alcoholic liquor that the bottle and case price of alcoholic liquor to wholesalers set forth in the schedule is no higher than the lowest price at which such item of liquor was sold by the brand owner, or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which the schedule is filed. As used in this section "related person" means any person:

A. in the business of which the brand owner has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers;

B. in the exclusive, principal or substantial business of selling a brand or brands of alcoholic liquor purchased from the brand owner; or

C. who has an exclusive franchise or contract to sell the brand or brands.

Section 7. FAILURE TO FILE—SCHEDULE DEEMED INVALID.—In the event an affirmation with respect to any item of alcoholic liquor is not filed within the prescribed time, any schedule for which the affirmation is required shall be deemed invalid with respect to that item of alcoholic liquor, and no such item may be sold to or purchased by any wholesaler during the period covered by any such schedule.

Section 8. DETERMINATION OF LOWEST PRICE. —In determining the lowest price for which any item of alcoholic liquor was sold in any other state or in the District of Columbia, or to any state or state agency which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state or state agency or retailer, as the case may be, purchasing such item in the other state or in the District of Columbia; provided nothing contained in the Discrimination in Selling Act shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this section, "state taxes and fees" means the excise taxes imposed or the fees required by any state or the District of Columbia upon, or based upon, the gallon of liquor, and the term "gallon" means two hundred thirty-one cubic inches.

Section 9. VIOLATION—PENALTY.—

A. Violation of the Discrimination in Selling Act is a violation of the Liquor Control Act.

B. Notwithstanding any other penalty provided in the Liquor Control Act, any person who knowingly makes a false statement in any affirmation made and filed pur-

suant to the Discrimination in Selling Act shall be liable for suspension of any license issued by the division of liquor control for a period not to exceed five days for the first offense and thirty days for each offense thereafter.

Section 10. AUTHORITY TO REFUSE AFFIRMATION.—Upon final judgment of conviction of any person after appeal, or in the event no appeal is taken, upon the expiration of the time during which an appeal could have been taken, the chief of the liquor control division may refuse to accept for any period of months not exceeding three calendar months any affirmation required to be filed by such person.

LAWS OF 1979

CHAPTER 83

AN ACT

RELATING TO ALCOHOLIC LIQUORS; AMENDING THE DISCRIMINATION IN SELLING ACT.

BE IT EXACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 60-12-2 NMSA 1978 (being Laws 1967, Chapter 269, Section 2) is amended to read:

"60-12-2. FILING OF SCHEDULES REQUIRED.—No brand of alcoholic liquor shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule is filed with the director of the department of alcoholic beverage control and is then in effect. For the purposes of the Discrimination in Selling Act, "alcoholic liquor" means alcoholic liquor as defined in Section 60-3-1 NMSA 1978."

HOUSE BILL 278

Approved March 16, 1979

Supreme Court, U.S.
FILED
JAN 23 1992
OFFICE OF THE CLERK

(2)

No. 91-922

In The

Supreme Court of the United States

October Term, 1991

THE STROH BREWERY COMPANY,

Petitioner,

vs.

DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

We consider the statement of the petitioner of the question presented for review to be misleading.

The decision of the New Mexico Supreme Court in this case was primarily based on the New Mexico law of the case doctrine, which is a procedural bar to re-litigation in the case of an issue already decided by the New Mexico Supreme Court. The actual question of federal retroactivity was merely a side issue bearing on whether or not the New Mexico Supreme Court's original decision in the case was clearly and palpably erroneous, as well as unjust. No substantial federal question is presented.

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No. 91-922

In The

Supreme Court of the United States

October Term, 1991

THE STROH BREWERY COMPANY,

Petitioner,

vs.

DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

I. THE NEW MEXICO SUPREME COURT DID NOT ERRONEOUSLY DECIDE A SUBSTANTIAL FEDERAL QUESTION.

The first New Mexico Supreme Court decision in this case was *United States Brewers Association, Inc., v. Director of the New Mexico Department of Alcoholic Beverage Control,* 100 N.M. 216, 688 P.2d 1093 (1983); appeal dismissed 465 U.S. 1093, 104 S.Ct. 1581, 80 L.Ed.2d 115 (1984). In dismissing the appeal to the United States Supreme Court,

this Court stated that it was "dismissed for want of a substantial federal question."

Since this case was previously appealed, and this Court decided that there was no substantial federal question, and dismissed the appeal, under the law of the case doctrine as laid down by the United States Supreme Court, that question should not be re-examined, and the petition for writ of certiorari should be denied on that basis.

In *Tyler v. McGuire*, 84 U.S. 253, 17 Wall. 253, 21 L.Ed. 1056 (1873) the court stated:

> . . . None of the questions which were before the court on the first writ of error can be reheard or examined upon the second, as it would lead to endless litigation. *Sizer v. Many*, 16 How. 98; *Corning v. Iron Co.*, 15 How. 466; *Himely v. Rose*, 5 Cranch, 315; *Martin v. Hunter*, 1 Wheat. 355. (21 L.Ed. 383)

The opinion in *Clark v. Keith*, 106 U.S. 464, 1 S.Ct. 568, 27 L.Ed. 302 (1883) states:

> . . . That question is no longer open in this case, for the reason that it has long been settled that whatever has been decided here on one writ of error cannot be re-examined on a subsequent writ brought in the same suit. * * * (27 L.Ed. 302)

The above principles were further explained in *Messinger v. Anderson*, 225 U.S. 436, 32 S.Ct. 739, 56 L.Ed. 1152 (1912). Mr. Justice Holmes stated that the law of the case doctrine did not limit the power of the United States Supreme Court to re-examine a question, but it expresses the practice of courts generally to refuse to reopen what

has already been decided. An extreme situation was presented in that case, which required its reconsideration for justice to be done, as the matter had become res judicata because of another action between the two decisions of the circuit court of appeals in the case.

A number of the cases that have come before the United States Supreme Court were on law of the case questions in lower courts, and few appear to have involved prior decisions of this Court in the same case, as did the three cases referred to above.

When these cases are considered together it would appear that the law of case doctrine, as stated by this Court, is very similar to the law of the case doctrine in New Mexico.

Even without the federal law of the case bar, this case still presents no substantial federal question that should be decided by this Court. The New Mexico Supreme Court decision is primarily based on two questions of State law. They are construction of the bond involved, – purely a question of State law; and the application of the New Mexico law of the case doctrine.

The law of the case doctrine, as applied in New Mexico, is a procedural bar which prohibits re-litigating an issue previously decided in the same case, with certain very restricted exceptions, none of which apply here.

The federal retroactivity question is merely a side issue relating to whether or not our State Supreme Court's prior decision in this case was both clearly erroneous at the time it was decided, and, in addition, would work an injustice.

The Petitioner is asking this court to direct the New Mexico Supreme Court on how it should apply its own law of the case doctrine, which is clearly New Mexico law.

The petitioner erroneously relies on *James B. Beam Distilling Company v. Georgia*, 501 U.S. ___, 115 L.Ed.2d 481, 111 S.Ct. 2439 (1991). Justice Souter's controlling opinion in that case, in which Justice Stevens joined, states:

> Of course, retroactivity in civil cases must be limited by the need for finality, see *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 84 L.Ed. 329, 60 S.Ct. 317 (1940); once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed. * * * (115 L.Ed.2d 492)
>
> * * *
>
> * * * While those whose claims have been adjudicated may seek equality, a second chance for them could only be purchased at the expense of another principle. "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties." * * * (115 L.Ed.2d 493)
>
> The grounds for our decision today are narrow. * * * (115 L.Ed.2d 493)
>
> * * * Nothing we say here deprives respondent of his opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must

> be provided, a matter with which *McKesson* did not deal. * * * (115 L.Ed.2d 494)

Included under Point II is our explanation showing that the decision of the New Mexico Supreme Court in this case was primarily, if not wholly, based on the application of the New Mexico procedural bar of the law of the case doctrine.

Even if the New Mexico Supreme Court were considered wrong in its reasoning on the federal retroactivity issue, it was still entitled to apply its own procedural bar to re-litigation under the law of the case.

The first New Mexico Supreme Court decision left nothing to do in this case, other than determine the amounts owed under the bond. The record will show a substantial amount of work done in discovery and litigation in regard to the amounts, and while this was ongoing, the United States Supreme Court decided *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 106 S.Ct. 2080 (1986). Stroh then tried to re-litigate the constitutional matter previously litigated and determined.

Certainly Stroh should not be allowed to use the time in which it delayed payment of the amounts owed under the prior decisions of the State District Court, the New Mexico Supreme Court, and the United States Supreme Court, to again re-litigate the matters already decided.

II. THE NEW MEXICO DECISION WAS PRIMARILY BASED ON STATE LAW AND WAS CORRECT.

The opinion of the New Mexico Supreme Court in this case distinctly shows that its decision was based on the New Mexico law of the case doctrine. It stated:

> The parties advance the following arguments on appeal. Stroh argues that our holding in *United States Brewers Ass'n* is not the law of the case and should not be applied as such in determining if Stroh is liable under the bond. * * * Under the supremacy clause of the United States Constitution, Stroh argues, we must follow the mandate of *Healy II* in holding the 1979 law invalid, and thus absolve Stroh from any liability under the bond. (Pet.App. 7a)
>
> The Director counters by arguing that under the Supreme Court's recent holding in *American Trucking Associations v. Smith*, 495 U.S. ___, (1990), *Healy II* should not be given "retroactive effect." Consequently, the Director argues, our prior ruling on the 1979 law in *United States Brewers Ass'n* is the law of the case and must be given effect now, regardless of any subsequent invalidation of the 1979 law by *Healy II*. The director also urges a different reading of New Mexico law of the case doctrine than that asserted by Stroh. By that doctrine, the Director argues, we correctly decided *United States Brewers Ass'n* based on *Seagram*, the applicable governing precedent at the time of our decision. Hence, our decision in the case, establishing the law of the case, was not "clearly, palpably or manifestly erroneous or unjust." (Pet.App. 7a-8a)

* * *

* * * Neither our decision in *United States Brewers Ass'n*, nor the trial court's ruling appealed in that case, were "clearly, palpably, or manifestly erroneous," as the Supreme Court itself has only just held that *Seagram* is no longer good law. How could a decision based on the right law at that time now be a "manifestly erroneous" decision? (Pet.App. 13a)

Further, neither our decision in *United States Brewers Ass'n*, nor the trial court's ruling appealed in that case have produced an unjust result, * * * . (Pet.App. 13a)

* * *

Therefore, under the law of this case, *Healy II* does not invalidate the 1979 law. As the trial court correctly ruled, the law of this case is that dictated by our holding in *United States Brewers Ass'n* and the underlying trial court decision appealed in that case. The recent case of *James B. Beam Distilling Co. v. Georgia*, 59 U.S. L.W. 4735 (June 20, 1991), notwithstanding, which we find inapplicable, we affirm the judgment below on the *central issue* discussed above. (Emphasis supplied.) (Pet.App. 14a)

The above language leaves no question that the law of the case doctrine, as stated by the court, was the "central issue" on which the case was decided.

Justice Franchini's concurring opinion further explains the court's decision on the law of the case in conjunction with the *Beam* decision, as follows:

. . . The matter before us today has been in litigation since 1979, and Stroh is subject to our

> decision in *United States Brewers Association v. Director of N. M. Department of Alcoholic Beverage Control* 100 N.M. 216, 668 P.2d 1093 (1983), *appeal dismissed sub nom. United States Brewers Association v. Rodriguez*, 465 U.S. 1093 (1984), which we find to be controlling here as the law of the case. Application of the law of the case doctrine in this matter places this case squarely in the context of those cases beyond the narrow scope of the *Beam* decision. (Pet.App. 16a)

It has long been recognized in New Mexico that the law of the case doctrine, as applied to a former appeal, is a procedural bar, similar to, and with aspects of, res judicata, which prohibits the re-litigating of an issue decided in the prior appeal. *Union Trust Co. of New York v. A. T. & S. F. R. Co.*, 8 N.M. 159, 42 Pac. 89 (1895); *Crary v. Field*, 10 N.M. 257, 61 Pac. 118 (1900).

Whether right or wrong, the law of the case as decided in the prior appeal is controlling in the second appeal. *Sanchez v. Torrez*, 38 N.M. 556, 37 P.2d 805 (1934). As explained by the New Mexico Supreme Court in this present case, two requirements must be met if the law of the case is not to be applied. First, the prior decision must have been clearly, palpably, or manifestly erroneous. Secondly, its application would have to amount to an injustice in the case. The first decision of the Court was certainly not erroneous, and an injustice would only result if the law of the case doctrine were not applied. Both the New Mexico District Court and the New Mexico Supreme Court, within their prerogatives on state law, decided both of these issues in favor of the respondents.

The idea that the original decision of the New Mexico Supreme Court was erroneous is even more of a fiction than the premise that this court did not change the existing law when it overruled the *Seagram* decision.

In 1983, the New Mexico Supreme Court did not even have the jurisdictional power to overrule *Seagram & Sons v. Hostetter,* 384 U.S. 35, 86 S.Ct. 1254 (1966).

To argue that the first decision in this case was "clearly and palpably erroneous" defies reason.

We recognize that the State law of the case doctrine, in some instances, may not be an unqualified bar to examination of the question by the United States Supreme Court. See *Hathorn v. Lovorn,* 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). In this case a petition for writ of certiorari had been previously denied.

However, there are vital and controlling differences between our case and the *Hathorn* case. Both decisions of the Mississippi Supreme Court in the *Hathorn* case were contrary to federal law at the time the decisions were made. No subsequent law change was involved, and neither decision was based on a particular period of time in which a previously existing law was in effect, as we have in our case.

Justice O'Connor noted that if the state law of the case doctrine barred examination in situations such as the *Hathorn* case an interlocutory State Court decision could prevent the opportunity of the United States Supreme Court to examine the federal question at issue. This certainly doesn't exist in our case, because this Court had an

opportunity to examine the question, and did determine that there was no substantial federal question.

In the *Hathorn* case, Justice O'Connor also recognized that a State procedural rule could be a bar to re-litigation of an issue, if "strictly and regularly followed." As previously explained, the New Mexico Supreme Court strictly and regularly follows its law of the case doctrine, with the exceptions noted.

Certainly the latest case that we know of on this subject, which is the *Beam* case, specifically states that the State procedural bars may be raised to re-litigation of a decided issue.

Both decisions of the New Mexico Supreme Court in this case were correct, whereas both decisions of the Mississippi Supreme Court in the *Hathorn* case were incorrect.

This Court should not reverse a correct decision of the New Mexico Supreme Court, where the federal retroactivity issue was related as a collateral matter in determining whether its first decision should be considered manifestly erroneous. Regardless of whether or not *Healy II* should be considered retroactive in some cases, it certainly should not be considered as making the first decision of the New Mexico Supreme Court incorrect, when it was based on the controlling law at the time and, without question, was correct.

We also respectfully submit that all of this is a question of State law which should not be dictated to New Mexico by the United States Supreme Court.

III. ALTHOUGH NOT A NECESSARY FACTOR, THE DECISION BELOW CORRECTLY STATED FEDERAL LAW.

We consider the procedural bar of the New Mexico law of the case doctrine, as applied by the New Mexico Supreme Court, to be conclusive in this case, and that it is unnecessary to even consider retroactivity under Point III.

However, even without that bar, we deem the particular facts of this case to support the application of nonretroactivity, even under the reasoning of Justices Souter, Stevens, Blackmun, Marshall, and Scalia in the *Beam* case, since *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 (1971), has not been overruled. Justice Souter's opinion in *Beam* states:

> . . . Conversely, nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases. (115 L.Ed.2d 493)

As explained by the New Mexico Supreme Court in this case, there is no doubt that New Mexico had liquor price discrimination laws from 1967 until the decision of this court in *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 109 S.Ct. 2491 (1989) (*Healy II*).

All of the distillers selling products in New Mexico would have presumably complied with that law during all of that time, since the law presumes that public officials perform their duties. *Herrera v. Zia Land Co.*, 51 N.M. 390, 185 P.2d 975 (1947). All of the brewers would have presumably complied with that law during all of the period they were within its purview, or settled their cases

as to the amounts owed pursuant to the first decision of the New Mexico Supreme Court in this case, except The Stroh Brewery Company. It would be grossly inequitable to allow Stroh to be the only liquor supplier in New Mexico to escape the law during the period it was in effect, and penalize the New Mexico wholesalers who distributed its products, by allowing them to be the only wholesalers in the State to be overcharged by the unlawful pricing practices. And there is no question that the pricing was unlawful during all of the period for which the overcharges were determined.

We would point out, as did the New Mexico Supreme Court, that in the *Healy II* case in question, this Court expressly recognized that it was changing the law as it existed prior to the overruling decision, stating:

> To the extent that *Seagram* holds that retrospective affirmation statutes do not sufficiently violate the commerce clause, *it is no longer good law.* (Emphasis supplied.) (491 U.S. 343)

We certainly do not agree with Stroh's reasoning on the retroactivity aspects of *Healy II*. The basic action was for a declaratory judgment and an injunction. This does not call for retroactive relief, such as tax refunds cases. Nothing whatsoever indicates that any court involved was doing anything or making any decision to undo or make ineffective the compliance with the law prior to the Court of Appeals declaring it invalid. Certainly, the affirmance by the United States Supreme Court of the Court of Appeals decision would make the decision valid when it was rendered, but it would not make it retroactive. The posture of the case and the nature of the relief requested would not even present the question of retroactivity in

either the lower court cases or the United States Supreme Court case.

The language of this Court, if anything, was prospective.

There are also other more direct reasons why *Healy II* should not be given retroactive effect insofar as our case is concerned.

Healy II dealt with a concurrent price affirmation statute under Connecticut law. Our case does not involve the Connecticut statute, and the New Mexico statute on which the over-charges were based was retrospective, such as was approved in *Seagram*.

The statement of the United States Supreme Court in *Healy II* that retrospective affirmation statutes are "no longer good law" was a gratuitous statement, and cannot be reasonably construed as retroactively eliminating the effectiveness of all price affirmation statutes all over the country for the more than twenty years they were in effect prior to the decision. The only logical application is that these statutes, such as the one in New Mexico, would thereafter no longer be considered valid.

The District Court's opinion in this case shows that all of the relief afforded was based on the New Mexico retrospective price discrimination statute in effect in 1979. It also shows that it was based on the New Mexico law of the case doctrine. The New Mexico District Court stated (Pet.App. 36a):

> 2. The decision of the Supreme Court of New Mexico in *The United States Brewers Association, Inc. v. Rodriguez*, 100 N.M. 216, 668 P.2d

1092 (1983), upholding the constitutionality of the 1979 Law is *res judicata* and the law of the case in this matter.

3. The 1979 Law was constitutional and valid and provided a continuing basis for Stroh's liability pursuant to the Preliminary Injunction Bond and the Supersedeas Bond from the period June 15, 1979 through February 21, 1985.

The New Mexico Supreme Court noted the basis of the decision of the District Court as to liability under the 1979 Law, and affirmed the decision in its entirety. (Pet.App. 6a, 14a)

The argument that the statement in *Healy II*, that retrospective statutes were no longer good law, should be applied retroactively to parties that were not before the Court, to a statute that was not before the Court, and in the circumstances of this case, belies reason and justice.

We also disagree with the fallacious reasoning of Stroh that this case should be used as a vehicle to change the existing law relating to the retroactive effect of court decisions which change the law.

If the law on retroactivity is going to be changed, it should go the opposite direction of that argued by Stroh. Overruling decisions should be given retroactive effect only in cases where demonstrated equities require it for justice in a particular case.

It is the retroactive law change that is disruptive and works mischief to an extent that often cannot be determined or foreseen.

The legislatures, which are supposed to be the law making bodies of government, do not even have the power in many instances to make retroactive law changes.

Surely this Court should not make retroactive law changes as a matter of course.

When a long standing precedent supporting numerous subsequent statutes of the states is reversed by the Supreme Court of the United States, it is patently fallacious to say that the law has not been changed, and worse than fiction to pretend that the Court has only just discovered what the law was in the past.

The state legislatures, state courts, and all lower federal courts, must abide by the interpretation of the law by the United State Supreme Court. When it reverses its position, the law on the subject is definitely changed. The change is just as emphatic, and often more disruptive, than it would be if made by the legislature.

All the reliance that should be required to prevent retroactive application of a law changing decision is the reliance of the State legislature in passing the law pursuant to and consistent with the existing precedent laid down by this Court. However, if more equitable reasons are needed, they are abundant in this case, as previously explained.

This is the highest court in the land. It should not decide the important matters before it on a premise that is pure fiction.

This case is an invitation to the Court to ignore reality and accept the false argument that liquor price

discrimination laws did not exist in New Mexico and throughout the country for over twenty years.

We respectfully submit that the reasoning of Justice O'Connor, in the *Beam* case, joined in by Chief Justice Rehnquist and Justice Kennedy, should be applied to this case. And, on our particular facts, it would not be contrary to the reasoning of Justices Souter and Stevens in the controlling opinion. Justice O'Connor stated:

> * * * I reiterate, however, that precisely because this Court has "the power 'to say what the law is,'. . . . " . . . when the Court changes its mind, the law changes with it. * * * (115 L.Ed.2d 498)
>
> * * *
>
> " . . . because the State cannot be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent." (115 L.Ed.2d 502)

We also consider applying non-retroactivity in this case consistent with Justice White's concurring opinion in the *Beam* case.

Justice Scalia, in his concurring opinion in *Beam*, recognized "that judges in a real sense 'make' law."

Justice Scalia's reasoning in his concurring opinion in *American Trucking Assn's., Inc. v. Smith*, 483 U.S. 954, 110 S.Ct. 2323 (1990), should be applied to the facts of this case. Justice Scalia stated:

> Accordingly, I would affirm the decision below with respect to Arkansas' HUE taxes imposed pre-*Scheiner*, because in my view they

were constitutional. I would reverse the decision below with respect to Arkansas' HUE taxes imposed post-*Scheiner* because they were unlawful by virtue of that decision. I thus concur in the judgment of the Court. (110 S.Ct. 2345)

CONCLUSION

This Court has previously decided that this case did not involve a substantial federal question. That issue should not be re-litigated at this late date.

Also, the primary basis of the decision of the New Mexico Supreme Court was the application of the New Mexico law of the case doctrine, which is a procedural bar to re-litigation of decided issues in the case. It is a question of State law which should not be dictated to New Mexico by the United States Supreme Court.

Even if only the federal constitutional law were involved, the facts of the case do not establish that the New Mexico Supreme Court abused its discretion in determining the equities under the particular circumstances of the case.

For these reasons, any one of which would be sufficient by itself, the petition for writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 91-922

In The

Supreme Court of the United States

October Term, 1991

THE STROH BREWERY COMPANY,

Petitioner,

v.

DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

BRIEF IN OPPOSITION OF RESPONDENT DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

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QUESTION PRESENTED

The petition mischaracterizes the proceeding and holding below by presenting the judgment as grounded on the federal issue of retroactivity of United States Supreme Court decisions.

In *Stroh Brewery Company v. Director of the New Mexico Department of Alcoholic Beverage Control,* 816 P.2d 1090 (1991), the judgment to which petitioner directs this Court in this proceeding, the Supreme Court of New Mexico held that its ruling on a prior appeal that the price affirmation requirement of the 1979 New Mexico Discrimination in Selling Act was constitutional was the law of the case and that neither *James B. Beam Distilling Company v. Georgia,* 111 S.Ct. 2439 (1991) nor *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971) required it to except to that doctrine as a procedural bar and apply *Healy v. Beer Institute, Inc.,* 491 U.S. 324 (1989) (*"Healy II"*) to retroactively invalidate its earlier decision.

The question therefore presented here for review is:

Should this Court exercise its certiorari jurisdiction to review a state court judgment based on the adequate, independent and bona fide state ground of the procedural bar of the doctrine of law of the case in a civil action?

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BRIEF IN OPPOSITION OF RESPONDENT DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

Respondent, Director of the New Mexico Department of Alcoholic Beverage Control ("Director") hereby respectfully requests that this Court deny the petition of petitioner, The Stroh Brewery Company ("Stroh") filed with this Court December 12, 1991.

STATEMENT OF THE CASE

Director hereby incorporates by reference the Statement of the Case in the opinion below. Further, Director

adds the following to correct petitioner's Statement of the Case herein. As argued in Point I of this Brief in Opposition, the Supreme Court of New Mexico, in its opinion below, affirmed the judgment of the trial court on the central and primary basis that the New Mexico doctrine of law of the case, under the facts and circumstances of this litigation, was a procedural bar to re-examination and re-litigation of an issue decided by it on earlier appeal in 1983. Quotations from and citations to the New Mexico opinion are provided below (references to opinion in Petitioner's Appendix). Director submits that the petition generally ignores the real basis of the New Mexico decision and through misdirection attempts to create an impression of circumstances that do not exist in the record.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE DECISION BELOW IS ADEQUATELY AND INDEPENDENTLY SUPPORTED BY A BONA FIDE STATE GROUND

This Court should deny Stroh's petition for a writ of certiorari. The petition almost completely ignores that the Supreme Court of New Mexico's opinion was primarily based on a state issue, a procedural bar to further litigation, the doctrine of law of the case. This Court should not review state court judgments that are supported by bona fide, adequate and independent state grounds, even if federal questions are raised and resolved in the case.

Klinger v. Missouri, 13 Wall. 257, 263 (1871); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

Although the Supreme Court of New Mexico did discuss the issue of retroactivity and, using a *Chevron* (see *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)) analysis, resolve it in favor of respondents, it grounded its opinion on a state law issue, the New Mexico doctrine of law of the case. The court below was careful in outlining and highlighting the basis for its opinion. The majority stated:

> The parties advance the following arguments on appeal. Stroh argues that our holding in *United States Brewers Association* is not the law of the case and should not be applied as such in determining if Stroh is liable under the bond. Stroh argues that, following our holdings in *Reese v. State*, 106 N.M. 505, 506, 745 P.2d 1153, 1154 (1987), and *Moya v. Catholic Archdiocese*, 107 N.M. 245, 248, 755 P.2d 583, 586 (1988), the law of the case doctrine in New Mexico cannot be used "where the former appellate decision was clearly, palpably, or manifestly erroneous. . . ." (quoting *Reese*, 106 N.M. at 507, 745 P.2d at 1155.) Under the supremacy clause of the United States Constitution, Stroh argues, we must follow the mandate of *Healy II* in holding the 1979 law invalid, and thus absolve Stroh from any liability under the bond.

Pet. App. 7a.

> The Director counters by arguing that under the Supreme Court's recent holding in *American Trucking Association v. Smith*, 495 U.S. ___, 110 S.Ct. 2323, 110 L. Ed. 2nd 148 (1990), *Healy II* should not be given "retroactive effect." Consequently, the Director argues, our prior ruling on

> the 1979 law in *United States Brewer's Association* is the law of the case and must be given effect now, regardless of any subsequent invalidation of the 1979 law by *Healy II*. The Director also urges a different reading of New Mexico law of the case doctrine than that asserted by Stroh. By that doctrine, the Director argues, we correctly decided *United States Brewer's Association* based on *Seagram*, the applicable governing precedent at the time of our decision. Hence, our decision in the case, establishing the law of the case, was not "clearly, palpably or manifestly erroneous or unjust."

Pet. App. 7a, 8a.

> * * * Neither our decision in *United States Brewer's Association*, nor the trial court's ruling appealed in that case, were "clearly, palpably or manifestly erroneous," as the Supreme Court itself has only just held that *Seagram* is no longer good law. How could a decision based on the right law at that time now be a "manifestly erroneous" decision?

Pet. App. 13a.

> Further, neither our decision in *United States Brewer's Association*, nor the trial court's ruling appealed in that case, have produced an unjust result.

Pet. App. 13a.

* * *

> Therefore, under the law of this case, *Healy II* does not invalidate the 1979 law. As the trial court correctly ruled, the law of this case is that dictated by our holding in *United States Brewer's*

> *Association* and the underlying trial court decision appealed in that case. The recent case of *James B. Beam Distilling Company v. Georgia*, 59 U.S. L.W. 4735 (June 20, 1991), notwithstanding, which we find inapplicable, we affirm the judgment below on the *central issue* discussed above. (Emphasis supplied.)

Pet. App. 14a.

From these excerpts, it is clear that the parties framed and the court below analyzed the central issue as that of law of the case. Within that context, the court determined that it was not required to depart from its earlier decision and that, in fact, even a *Chevron* analysis was consistent with requiring it, on the basis of the equities involved, to apply the doctrine as a procedural bar to reversal. The majority opinion, therefore, after taking into account Stroh's arguments regarding retroactivity, affirmed the trial court on the "central issue" of law of the case.

Justice Franchini's concurring opinion elaborated on the inapplicability of *James B. Beam Distilling Company v. Georgia* ("*Beam*"), 111 S.Ct. 2439 (1991):

> * * * The matter before us today has been in litigation since 1979, and Stroh is subject to our decision in *United States Brewer's Association v. Director of N.M. Dept. of Alcoholic Beverage Control*, 100 N.M. 216, 668 P.2d 1093 (1983), *appeal dismissed sub nom, United States Brewer's Association v. Rodriguez*, 465 U.S. 1093 (1984), which we find to be controlling here as the law of the case. Application of the law of the case doctrine in this matter places this case squarely in the

> context of those cases beyond the narrow scope of the *Beam* decision.

Pet. App. 16a.

There may therefore have been no real need to undertake the *Chevron* retroactivity analysis (except to avoid the certainty that failure to address the retroactivity issue would have fueled Stroh's efforts in this Court), because the court below affirmed the trial court on the "central issue" of law of the case, purely a state law issue. However, as noted above, the court below took care in distinguishing its law of the case holding from *Chevron* and *Beam*, allowing this court to view the state and federal issues as independent.

Early law of the case doctrine in New Mexico was a procedural bar as inviolable as and similar to res judicata, forbidding a change in law decided on a prior appeal, whether the earlier decision was right or wrong. *Sanchez v. Torrez*, 38 N.M. 556, 37 P.2d 805 (1934). Recent decisions have relaxed that rigid structure somewhat by allowing reexamination of the same issue on a later appeal in extremely limited circumstances when, among other things, not to do so would be "manifestly unjust" and the first decision was "manifestly erroneous". *Reese v. State*, 106 N.M. 505, 745 P.2d 1153 (1987); *Moya v. Catholic Archdiocese*, 107 N.M. 245, 755 P.2d 583 (1988).

In the proceedings below, as noted above, Stroh urged the Supreme Court of New Mexico to find that its earlier decision in *United States Brewer's Association v. Director, N.M. Dept. of Alcoholic Beverage Control*, 100 N.M. 216, 688 P.2d 1093 (1983); *appeal dismissed sub nom, U.S.B.A. v. Rodriguez*, 465 U.S. 1093 (1984) ("*U.S.B.A.*"),

was "manifestly erroneous," in light of *Brown-Forman Distiller's Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986) and *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989) ("*Brown-Forman*" and "*Healy II*," respectively). This the court refused to do, holding that its reliance on *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966) ("*Seagram*") made its earlier decision supportable and therefore not "manifestly erroneous" and further that to reverse its earlier decision would be unjust to the state and other parties. Pet. App. 12a, 13a. For this Court to hold that the New Mexico court's analysis of what is and what is not "manifestly erroneous" under New Mexico law of the case doctrine or to determine what other aspects of the doctrine may or may not have been correctly applied, including balancing of the equities involved, would be an inappropriate exercise of certiorari jurisdiction.

Director recognizes that a state judgment based on the law of the case doctrine may not always prevent this Court's review of a previously decided federal issue. See, *Hathorn v. Lovorn*, 457 U.S. 255 (1982). In *Hathorn*, however, the federal issue was not raised in the first appeal, but later by rehearing petition and that petition was denied without comment. *Hathorn*, 457 U.S. at 258, 259. As a result, Justice O'Connor saw the first decision as not "final" and not therefore sufficient to "prevent us from reviewing federal questions determined in the first appeal." *Hathorn*, 457 U.S. at 262. The Court went on to determine that both Mississippi Supreme Court opinions were incorrect.

Hathorn is in sharp contrast to the case at bar. Here, there is no question that the Supreme Court of New Mexico finally decided the federal question in the first

appeal in 1983. *U.S.B.A.*, 688 P.2d 1093 (1983). At the time, based on *Seagram*, the decision was correct, which this Court recognized in dismissing the federal appeal in 1984. *U.S.B.A.*, 465 U.S. 1093. In *Hathorn*, there was no issue of an attempted retroactive application of new law to an established decision. *Hathorn* was a situation in continuing flux. The case now before the Court is one in which the liability question has been settled for nearly seven years. As such, the New Mexico decision, based on the law of the case, under *Hathorn* rests on adequate and independent state grounds.

This is also not a case, as Stroh proposes, with consequences beyond its own limited reach. In fact, at the heart of this case is only the question of Stroh's liability in money damages under preliminary injunction and supersedeas bonds posted in the underlying state court litigation. The New Mexico legislature in 1985 repealed the state statute which offended Stroh. To respondent Director's knowledge, this situation is singular in the United States. There are no other litigants in similar circumstances.

The essence of this case has been settled for years. Stroh's monetary liability (excluding interest) on its bonds was set in the period June 15, 1979 through February 21, 1985. Pet. App. 5a. On February 21, 1985, the decision in the first state court appeal was the law of the case and *Seagram* was still "good law." All that remained to be done, and all that was later done by the trial court, was to fix the exact amount of Stroh's liability on the bonds, pursuant to the mandate of the court below. The question of the constitutionality of the price discrimination legislation had been finally decided by the Supreme

Court of New Mexico and Stroh's appeal from that decision dismissed by this Court for want of a substantial federal question in 1984. *U.S.B.A.*, 465 U.S. 1093. The case, except for remedial proceedings relating to damages, was closed.

Stroh's bonds and the preliminary injunction in the underlying litigation conditioned Stroh's obligation to pay damages on a final decision that the 1979 law was valid. Pet. App. 2a, 3a, 34a, 35a. The court below determined that it had made such a final decision in the first state court appeal in 1983. In making that determination, the court below necessarily interpreted and construed the bond's language regarding "finality" to allow it to hold that its earlier decision determining liability on appeal was the law of the case and therefore a "final" result.

There is no suggestion in Stroh's petition that the New Mexico law of the case doctrine as a procedural bar is inadequate on the basis that it is not "strictly or regularly followed." See, *Barr v. City of Columbia*, 378 U.S. 146 (1964). To the contrary, the language of *Reese* and *Moya*, supra, indicate precisely the opposite, that the doctrine in New Mexico is faithfully invoked – and excepted to only when exceptional circumstances exist. This Court therefore has no cause to look behind the lower court's judgment with the concern that the doctrine was arbitrarily invoked in an attempt to avoid this Court's rulings in *Healy II* or *Beam*.

If this Court now assumes jurisdiction over this matter by granting Stroh's petition, it would review a narrow state court judgment based on New Mexico law of the case doctrine and involving interpretation of a contract

(the bonds). As such, the Court would be reviewing matters of state law. To grant Stroh its requested relief would mean dictating to the Supreme Court of New Mexico how, when and why it may use its state law of the case doctrine as a procedural bar to repetitive litigation and how it should interpret contracts. To do so under the circumstances of this case would not be an appropriate exercise of this Court's certiorari jurisdiction.

II

THE SUPREME COURT OF NEW MEXICO DID NOT ERRONEOUSLY RULE ON A SUBSTANTIAL FEDERAL QUESTION

A. Neither *Chevron* nor *Beam* Mandates Retroactive Application of *Healy II* Under the Facts of this Case

This Court has seen this case before. In 1984, the Court dismissed an appeal by the then-appellants, United States Brewers Association and others, including Stroh, for "want of a substantial federal question." *U.S.B.A.*, 465 U.S. 1093. Stroh is the only brewer party left in this litigation and now asks this Court, in light of *Healy II* and *Beam*, to reopen the federal question issue and grant relief notwithstanding the Court's 1984 ruling on appeal.

In determining that *Healy II* should not be applied retroactively to invalidate its earlier decision, the court below used a *Chevron* analysis and also found *Beam* to be inapplicable. Pet. App. 12a, 13a, 14a. The court did this, even though it affirmed the trial court's judgment on the central state issue of law of the case, as set forth above in Point I. Its decision on both grounds was correct.

Under *Beam*, a self-described "narrow" holding, there is nothing to prevent a state court from applying its own "procedural bars" to prevent retroactive application of new law to existing precedent. *Beam*, 111 S.Ct. at 2448. The Supreme Court of New Mexico did exactly that in refusing to except to its law of the case doctrine and did not, therefore, apply *Healy II* retroactively. It further found that the language of *Healy II*, with respect to *Seagram* "no longer" being good law (*Healy II*, 109 S.Ct. at 2502) was prospective rather than retroactive, that it would be inequitable to reexamine its earlier decision and, last, that a *Chevron* analysis compelled a holding of non-retroactivity.

Significantly, this Court remarked in *Healy II* that its decision in *Brown-Forman* was in part grounded upon "20 years of experience with the affirmation laws that proliferated after *Seagram*." *Healy II*, 109 S.Ct. at 2502. This analysis supports the Supreme Court of New Mexico's holding below that its earlier decision on appeal was not "manifestly erroneous." It further bolsters our argument that there are no retroactive aspects or implications raised in *Healy II* as to the overruling of *Seagram*, and that therefore under either a *Beam* or *Chevron* analysis, a retroactive application of the case is not appropriate.

The first state court appeal in this case upheld the constitutionality, based on *Seagram*, of a "retrospective" price affirmation statute. It was on that holding this Court dismissed the first appeal and also on that holding that the court below based its law of the case reasoning. Further, the final judgment below which Stroh asks this Court to review and reverse is grounded only on the same "retrospective" 1979 law providing a "continuing

basis" for Stroh's liability (Pet. App. 6a, 14a), not the "contemporaneous" type of statute found in *Healy II*.

In *Healy II*, although this Court overruled *Seagram* (a case also upholding the constitutionality of a "retrospective" price affirmation law), a "retrospective" law was not actually before this court. A "contemporaneous" law was. *Healy II*, 109 S.Ct. at 2499. Therefore, this Court's ruling as to *Seagram* in *Healy II* had to be prospective in nature, as neither the parties nor the issues at bar in *Healy II* were directly concerned with retrospective price affirmation and this Court therefore neither could have afforded nor did it afford relief on that basis.

So, the *Healy II* court overruled *Seagram* "in the interest of . . . avoiding further litigation on the subject of liquor price affirmation," not to afford relief to the parties then at bar. *Healy II*, 109 S.Ct. at 2502. The Court did not apply and could not have applied the overruling of *Seagram* in *Healy II* to the litigants before it and there would be no offense now to principle in not applying *Healy II* retroactively in this matter, the sort of problem which concerned the *Beam* court in its analysis of "modified, selective, prospectivity." *Beam*, 111 S.Ct. at 2444.

B. The Equities in this Matter Have Been Litigated and Found Not to Favor Stroh.

Under both its law of the case and *Chevron* analyses, the court below found the equities did not favor Stroh. *Beam* (as well as *Chevron*) allows "consideration of individual equities when deciding remedial issues in particular cases." *Beam*, 111 S.Ct. at 2448.

The equities in this case do not favor Stroh, as the Supreme Court of New Mexico expressly found. To allow Stroh, as the only supplier of brewed products to New Mexico wholesalers during the years 1979 to 1985, to neither comply with the law nor its obligations on its bonds, would be unjust to other settling brewer parties, wholesalers and the state. So the New Mexico court found. Pet. App. 12a, 13a. Stroh's predecessor and other brewers filed this action in 1979 for injunctive and declaratory relief. The law whose effects they sought to avoid has been off the books since 1985. Pet. App. 5a. In 1985, *Seagram* was still good law. Not until 1989, four years after the law's repeal, did the *Healy II* Court, in another action involving declaratory and injunctive relief, overrule *Seagram*.

It would be inequitable to the state, other settling brewers and respondent-wholesalers to apply *Healy II* retroactively under any analysis, given the history of this litigation, the state's reliance on *Seagram* and the purely prospective change in the law of price affirmation (vis-a-vis *Seagram*) which *Healy II* created.

Stroh suggests in its petition that this Court should overrule *Chevron* (which notably *Beam* did not do) in favor of a rule of automatic, all-encompassing retroactivity. Director submits that if this Court revisits *Chevron* and *Beam* in the future, any change in retroactivity jurisprudence should be away from the inflexible approach suggested in *Beam* and toward a methodology that recognizes the need for equitable analysis in individual cases, discussed by Justice O'Connor in *Beam*. Legislative action which attempts to change the past is not the norm, nor should similar judicial action be. To be sure, in certain

cases, this Court must step in to insure that past wrongs are rectified, but those cases should be few and selected because of individual factors favoring such relief. *Chevron* and the New Mexico law of the case doctrine recognize these principles and this is not such a case.

C. This Court May Follow Its Own Law of the Case Doctrine and Deny Stroh's Petition.

In addition to federal questions raised below and correctly decided, another reason why this Court should deny Stroh's petition is found in its own law of the case doctrine.

Since this Court dismissed the original appeal in this case in 1984, there have been only two significant developments with respect to the litigation. In the first, the trial court determined the amount of Stroh's liability on the bonds, a determination the Supreme Court of New Mexico affirmed on appeal. The second is the change in this Court's jurisprudence in the area of liquor price affirmation brought about by *Brown-Forman* and *Healy II*, a change which the court below held did not mandate re-examination of its 1983 decision holding the New Mexico price discrimination legislation constitutional under *Seagram*.

Under these circumstances and, given the procedural posture of this case, this Court may employ its own law of the case doctrine, having once dismissed the appeal of this case for lack of a substantial federal question. Grounded in precepts similar to New Mexico's, this doctrine empowers the Supreme Court to prevent repetitive litigation of the same issues and to settle the parties'

expectations in final decisions. *Tyler v. McGuire*, 17 Wall. 253 (1873); *Clark v. Keith*, 106 U.S. 464 (1883).

Although these earlier holdings were modified and expanded by later cases, including *Messinger v. Anderson*, 225 U.S. 436 (1912), this Court still retains the doctrine of the law of the case, a procedural bar to Stroh's petition, and based upon that doctrine, the Court may deny the relief Stroh requests.

CONCLUSION

The Court should not grant Stroh's petition. The New Mexico judgment is supported by adequate and independent state grounds. The New Mexico court's resolution of the federal retroactivity issues is proper, under *Chevron* or *Beam*, and collateral to the holding on the state doctrine of law of the case. Litigated equitable factors bear against Stroh and in favor of respondents. There are no far-reaching implications to this litigation's outcome. This Court has determined once before that no substantial federal question exists in this matter and that is the law of this case in this Court. There is no good reason, in fact or in law, for this Court to grant Stroh's petition.

Respectfully submitted,

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No. 91-922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STROH BREWERY COMPANY,
Petitioner,

v.

DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

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REPLY TO BRIEFS IN OPPOSITION

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IN THE

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OCTOBER TERM, 1991

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v.

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Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

REPLY TO BRIEFS IN OPPOSITION

Stroh respectfully replies to Respondents' briefs in opposition.[1]

ARGUMENT

I. APPLICATION BY THE MAJORITY BELOW OF LAW OF THE CASE IS NOT A "PROCEDURAL BAR" TO THIS COURT'S REVIEW

Respondents err in asserting that the decision by the New Mexico Supreme Court was "primarily based on a state issue" (Dir. Opp. 2) and that "[t]he federal retroactivity question is merely a side issue" (Whlrs. Opp. 3). As plainly evidenced by the majority, concurring and dissenting opinions, the decision below in fact turned on whether this Court's decision in *Healy* v. *Beer Institute*, 491 U.S. 324 (1989) (*"Healy II"*), applies retroactively.

[1] In this Reply, the brief in opposition filed by Respondent Director is cited as "Dir. Opp." and the brief in opposition filed by Respondents Wholesalers is cited as "Whlrs. Opp." Stroh's petition is cited as "Pet."

The majority below determined (erroneously) that *Healy II* does *not* apply retroactively and, seeing no reason to deviate from its earlier (pre-*Healy II*) ruling in this case, then applied the law of the case. Had a majority below determined (correctly—as the dissenters would have) that *Healy II does* apply retroactively, that majority presumably would have accepted that under the Supremacy Clause it was required to apply *Healy II* in this case.[2]

Respondents' portrayal of the decision below as grounded on New Mexico's law-of-the-case doctrine is as misguided as it is misleading, for it gets Respondents nowhere. A steady line of decisions by this Court has rejected the argument—advanced here by Respondents (Dir. Opp. 2-10, Whlrs. Opp. 6-10)—that a lower court's application of law of the case is a "procedural bar" to this Court's review. Even a mere sampling of those decisions establishes beyond a doubt that this Court may review all federal issues determined at any stage of the proceeding below despite a lower court's application of law of the case.

In *Davis* v. *O'Hara*, 266 U.S. 314 (1924), this Court unanimously held: "The ruling that the former decision of the state court became the law of the case does not affect the power of this Court to re-examine the question." 266 U.S. at 321 (citations omitted). In *Reece* v. *Georgia*, 350 U.S. 85 (1955), this Court (again unanimously) held: "We have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation, and our right to reexamine such questions is not affected by a ruling that the first decision of the state court became the law of the case." 350 U.S. at 87 (citations omitted). In *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), this Court held:

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[2] Selectively quoting passages of the majority opinion out of context, the Respondents go so far as to suggest that the majority opinion's expression "the central issue discussed above" (Pet. App. 14a) referred to the law of the case, when it obviously referred to the federal issue of retroactivity. Dir. Opp. 2-10; Whlrs. Opp. 6-10.

"the [State] Supreme Court's subsequent reliance on the law of the case cannot prevent us from reviewing federal questions determined on the first appeal." 457 U.S. at 262 (footnote omitted). In *Pennsylvania* v. *Ritchie*, 480 U.S. 39 (1987), this Court stated: "Law of the case principles are not a bar to this Court's jurisdiction, of course . . . ." 480 U.S. at 49. In *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800 (1988), this Court held: "[L]aw of the case cannot bind this Court in reviewing decisions below. A petition for a writ of certiorari can expose the entire case to review." 486 U.S. 817. Most recently, in *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177 (1990), this Court held that the lower court's reliance on law of the case "does not, of course, bind this Court." 110 S. Ct. at 3185.

One case in this unbroken line of authority, *Turner* v. *Arkansas*, 407 U.S. 366 (1972), is particularly apposite. On a first appeal the Arkansas Supreme Court rejected a federal constitutional argument by a criminal defendant. On a second appeal, the Arkansas Supreme Court declined to reconsider the defendant's federal constitutional argument on law-of-the-case grounds—despite an intervening decision by this Court at odds with the decision on the first appeal. This Court summarily reversed the Arkansas Supreme Court in a *per curiam* decision. 407 U.S. at 370.

The law of the case thus does not insulate from review the failure of the court below to apply a constitutional decision by this Court. Like *Turner*, moreover, this would be an appropriate case for summary reversal if this Court is so inclined.

II. IN LIGHT OF *HEALY II*, THIS COURT'S SUMMARY DISMISSAL OF STROH'S 1984 APPEAL WAS ERRONEOUS AND SHOULD BE RECTIFIED BEFORE THIS CASE BECOMES FINAL

As indicated in Stroh's petition (Pet. 4), on an earlier appeal in this case in 1984—before this Court decided *Healy II*—this Court dismissed Stroh's appeal "for want

of [a] substantial federal question." Respondents assert that this Court's earlier dismissal of Stroh's appeal makes this an improper case for this Court's review now. *See* Dir. Opp. 14-15; Whlrs. Opp. 1-5. The earlier appeal, however, was dismissed summarily on the authority of *Seagram*, which has since been overruled by this Court in *Healy II*. This Court's earlier dismissal of Stroh's appeal does not bar—or even militate against—this Court's review now; if anything, the earlier dismissal makes this a *more* compelling case for review because it presents this Court with an opportunity to correct its earlier summary disposition before this case becomes final.[3]

Under the law of the case, this Court is always free to revisit a ruling it made earlier in the same case. As Justice Holmes said for this Court in *Messinger* v. *Anderson*, 225 U.S. 436, 444 (1912), the law of the case "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." In *Arizona* v. *California*, 460 U.S. 605, 618 n.8 (1983), this Court reaffirmed Justice Holmes's classic statement and added: "Under law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injus-

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[3] While this Court did not explain its 1984 conclusion that the appeal lacked a "substantial federal question," the conclusion obviously was grounded on the controlling authority of *Seagram*. First, the Supreme Court of New Mexico had based its decision on *Seagram*. *See* Pet. 4; Pet. App. 4a. Second, in the motion for summary dismissal that this Court granted, Respondent Director argued that this case did not present a substantial federal question because *Seagram* controlled: "This case is factually and legally identical to *Seagram*. The New Mexico Supreme Court unerringly followed the command of this Court in upholding New Mexico's [1979] Discrimination in Selling Act." Motion of Appellee to Dismiss or Affirm at 6, Nos. 83-911, 83-927 (Jan. 25, 1984). Finally, in an opinion concurring with this Court's summary dismissal of Stroh's appeal, Justice Stevens similarly viewed *Seagram* as controlling. 465 U.S. 1093, 1093-94 (1984).

tice." *See also Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (under law of the case "[a] court has the power to revisit prior decisions of its own . . . in any circumstance").[4]

This Court should be particularly inclined to revisit its summary dismissal of Stroh's 1984 appeal because such summary dispositions are of limited precedential effect. This Court has held that the "cursory consideration" it accords a federal question in summarily disposing of an appeal "does not, of course, foreclose [the] opportunity to consider more fully that question." *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 308-09 n.1 (1976). Indeed, in *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490 (1981), this Court declared:

> As we have pointed out, . . . summary actions do not have the same authority in this Court as do decisions rendered after plenary consideration. They do not present the same justification for declining to reconsider a prior decision as do decisions rendered after argument and with full opinion. "It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action."

453 U.S. at 500 (quoting *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979)) (citations omitted).

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[4] Respondents misplace reliance on two cases decided over one hundred years ago—*Tyler* v. *Magwire*, 84 U.S. (17 Wall.) 243 (1872), and *Clark* v. *Keith*, 106 U.S. 464 (1882)—to support their argument that this Court does not have the power to revisit its 1984 summary dismissal of Stroh's appeal. Dir. Opp. 15; Whlrs. Opp. 2-3. The *Tyler* case harkens back to when the common law "term rule" limited a court's power to revisit judgments made in prior terms. The "term rule" was abolished in 1948 by the enactment of 28 U.S.C. § 452, which now reads: "The continued existence or expiration of a session of court in no way affects the power of the court to do any act or take any proceeding." *See generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 619-20 (6th ed. 1986). The *Clark* case has obviously been abandoned over the course of the last century by *Messinger* and its progeny.

Just two weeks ago, this Court reaffirmed its power to revisit an earlier decision in a case; as here, the earlier ruling there was a summary decision. In *Wyoming* v. *Oklahoma*, 60 U.S.L.W. 4119 (U.S. Jan. 22, 1992) a majority of the Justices acknowledged that the law of the case makes an exception where there has been a "change of circumstances, whether of fact or law." 60 U.S.L.W. at 4122. Although the majority declined to reverse the earlier summary decision, it said that "if convinced . . . that we were clearly wrong [earlier], we would not hesitate to depart from our prior rulings." *Id.* The dissenting Justices, who would have reversed the earlier decision, emphasized that it was "disposed of . . . summarily, without oral argument and without opinion." *Id.* at 4126 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J.).

It thus cannot be denied that this Court has the power to reconsider an earlier decision in a case—and should be particularly inclined to do so where the earlier decision was made summarily. Indeed, this Court has exercised such power under similar circumstances. In *Leverson* v. *Conway*, 472 U.S. 1014 (1985), as here, the plaintiff brought an action in state court challenging a state statute as violative of the Federal Constitution. As here, the challenge was unsuccessful in the state courts, *see* 144 Vt. 523, 481 A.2d 1029 (1984), and this Court dismissed "for want of [a] substantial federal question," 469 U.S. 926 (1984). After an intervening decision by this Court on the same issue in another case, however, this Court vacated its summary dismissal in *Leverson* and remanded the case to the state supreme court. 472 U.S. 1014.[5]

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[5] In numerous other instances this Court has vacated its earlier judgment of a case on the merits. *See, e.g., Parker Seal* v. *Cummins*, 433 U.S. 903 (1977) (prior affirmance vacated and case remanded in light of intervening decision of this Court); *Crampton* v. *Ohio*, 408 U.S. 941 (1972) (same); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959) (prior affirmance vacated and case affirmed following reargument); *Ladner* v. *United States*, 358 U.S. 169 (1958) (prior affirmance vacated and case reversed and remanded); *Reid* v. *Covert*,

After this Court's 1984 dismissal of Stroh's appeal, this case was remanded to the New Mexico trial court for further proceedings. Since then, *Healy II* has made clear that Stroh's 1984 appeal raised not only a "substantial federal question" but a meritorious one: *Healy II* has vindicated the claim that Stroh asserted when it instituted this action in 1979 and has advocated consistently ever since. This Court should accord the benefit of *Healy II* to Stroh, which was ahead of its time in recognizing the invalidity of the price-affirmation statutes that flourished under *Seagram*.[6] To deny Stroh relief now would be to give greater effect to this Court's summary disposition of Stroh's 1984 appeal than to the Court's 1989 decision on plenary review in *Healy II*. Moreover, because this case is not yet final, according Stroh the benefit of *Healy II* will not offend any notion of finality.

III. THE ISSUES RAISED IN STROH'S PETITION HAVE BROAD APPLICABILITY AND ARE CLOSELY RELATED TO OTHER CASES ON THIS COURT'S DOCKET

On one level, this is a case about a state trying to collect $20 million under a statute that it concedes is unconstitutional. On another level, however, this case implicates issues that go to the heart of this Court's civil retroactivity jurisprudence, which has been mired in confusion and uncertainty at least since *Beam* brought

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354 U.S. 1 (1957) (same); *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955) (same); *MacGregor* v. *Westinghouse Co.*, 329 U.S. 402 (1947) (same); *Halliburton Oil Well Cementing Co.* v. *Walker*, 329 U.S. 1 (1946) (prior affirmance vacated and case reversed); *Jones* v. *Opelika*, 319 U.S. 103 (1943) (same).

[6] In its Jurisdictional Statement filed in this Court in connection with its 1984 appeal, Stroh suggested that "this Court may wish to reconsider *Seagram*." Jurisdictional Statement, No. 83-911 (Dec. 16, 1983). As indicated above, in its successful motion to dismiss that appeal, Respondent Director argued that *Seagram* controlled because "[t]his case is factually and legally identical to *Seagram*." *See* supra n.3.

into question the continuing viability of *Chevron*. On that level, this case presents this Court with an excellent opportunity to resolve that confusion and uncertainty, which hamper the lower courts as they seek to apply this Court's decisions.

No fewer than three other cases currently on this Court's docket (each "pending conference") also directly address the relationship between *Beam* and *Chevron*: (1) *Pledger* v. *Bosnick*, *pet. for cert. filed*, 60 U.S.L.W. 3173 (U.S. Sept. 3, 1991) (No. 91-375); (2) *Harper* v. *Virginia Department of Taxation*, *pet. for cert. filed*, 60 U.S.L.W. 3406 (U.S. Nov. 15, 1991) (No. 91-794); and (3) *Lewy* v. *Virginia Department of Taxation*, *pet. for cert. filed*, 60 U.S.L.W. 3446 (U.S. Nov. 27, 1991) (No. 91-882). These cases, which concern the retroactivity of *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803 (1989), are highly akin to this case because *Davis*, like *Healy II*, did not explicitly state whether it applied retroactively. *See also Barker* v. *Kansas*, *pet. for cert. granted*, 60 U.S.L.W. 3042 (U.S. Nov. 27, 1991) (No. 91-611) (retroactivity of *Davis* raised below but not resolved in decision below); *Colorado* v. *Kuhn*, *pet. for cert. filed*, 60 U.S.L.W. 3481 (U.S. Dec. 13, 1991) (No. 91-980) (same). If this Court will be addressing retroactivity issues in these cases, or any others, it should grant Stroh's petition as well (or at least hold it for disposition in light of the resolution of such cases).[7]

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[7] While the retroactivity issues in this case are similar to those in the *Davis* cases the reliance interests are not. In the *Davis* cases the plaintiffs seek refunds of taxes paid under a statute later found to be invalid under a federal statute. Here the State seeks to collect money *now* based on a statute that has already been found unconstitutional. (This case also differs from the *Davis* cases in that here Stroh seeks to vindicate a *constitutional* right and not merely a federal statutory right.)

In *Trimble* v. *Gordon*, 430 U.S. 762 (1977), this Court declared unconstitutional statutes that disinherited illegitimate children. When a Texas court denied the benefit of *Trimble* to a litigant on the basis that *Trimble* did not apply retroactively, this Court unanimously reversed in *Reed* v. *Campbell*, 476 U.S. 852 (1986). This

Because this Court typically addresses issues of federal law—constitutional or otherwise—that are unsettled, virtually any decision by this Court announces arguably "new law" and thus raises retroactivity issues. Despite the current confusion as to whether decisions of this Court in the civil area are to be given retroactive effect, the lower courts have no choice but to address the issue. Even in the short period between Stroh's petition and this reply, several new decisions by lower courts reflect their continuing uncertainty in resolving issues of civil retroactivity:

• In *Bass* v. *South Carolina*, No. 23216 (Jan. 27, 1992), the Supreme Court of South Carolina, in declining to apply a decision of this Court retroactively, stated: "We do not read *Beam* as rejecting the *Chevron Oil* test. Four Justices clearly embrace the test's viability in determining retroactivity." Slip Op. at 9 n.4.

• In *Service Oil, Inc.* v. *North Dakota*, No. 910135 (Jan. 9, 1992), the Supreme Court of North Dakota, in giving retroactive effect to a decision of this Court, felt constrained to justify its decision under both *Chevron* and *Beam*.

• In *Rider* v. *San Diego*, 820 P.2d 1000 (Dec. 19, 1991), the California Supreme Court's treatment of a retroactivity issue prompted a dissenter to bemoan this Court's "tortuous path" on civil retroactivity and the "turmoil" caused by *Beam*.

• In *Southwestern Public Service Co.* v. *FERC*, No. 90-1513 (D.C. Cir. Jan. 14, 1992), the court of appeals suggested that *Chevron* is no longer good law when it stated that *Beam* "may forbid . . . selective retrospectivity."

Court found no justification for the state court's declining to apply the controlling law (*Trimble*) at the time of decision. 476 U.S. at 856. Here too, where there were no reliance interests at stake, there was no justification for the state court to decline to apply controlling law (*Healy II*).

• In *Melton* v. *Moore*, No. 91-35080 (9th Cir. Jan. 13, 1992), the court of appeals applied *Chevron*—without mentioning or citing *Beam*—in declining to give retroactive effect to a decision of this Court.

Until this Court clarifies its civil retroactivity jurisprudence—and particularly the status of *Chevron*—the lower courts will continue to take inconsistent approaches and reach inconsistent conclusions in determining whether to give retroactive effect to decisions of this Court.

CONCLUSION

For all of the foregoing reasons and those set forth in the petition itself, Stroh's petition for a writ of certiorari should be granted and (1) the judgment of the Supreme Court of New Mexico should be summarily vacated or reversed, or (2) this case should be set for plenary consideration.

Respectfully submitted,

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DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

SUPPLEMENTAL BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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REASON FOR SUPPLEMENTAL BRIEF

On January 22, 1992, the United States Supreme Court decided the case of *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119. This case is critically important in reinforcing the position of the respondents that the petition for writ of certiorari should be denied because the prior decision of the United States Supreme Court in this case decided the federal issue against the Respondent, and under the law of the case doctrine as stated by this Court, the issue decided should not be re-litigated.

This case was not available when the respondents' brief was written.

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No. 91-922

In The

Supreme Court of the United States

October Term, 1991

THE STROH BREWERY COMPANY,

Petitioner,

vs.

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ARGUMENT

I. THE PETITION SHOULD BE DENIED ON THE LAW OF THE CASE OF THIS COURT.

On page 6 of its Reply Brief, Stroh noted that on January 22, 1992, in *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119, this Court declined to reverse an earlier summary decision it had made in the same case. However, Stroh failed to note that a stated basis of the decision was this Court's law of the case doctrine. Writing for the majority, Justice White stated:

> . . . Although we have been reluctant to import wholesale law-of-the-case principles into original actions, *Arizona v. California*, 460 U.S. 605, 618-619 (1983), prior rulings in such cases "should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." (60 U.S.L.W. 4122)

The principles stated and followed in this latest case are on all fours with the law of the case issue in our case, and fully support our argument that the constitutional issue decided in this case, twice by the New Mexico Supreme Court, and once by this Court, should not be the subject of still further litigation. The statement in the case that if the Court was convinced that its prior decision accepting jurisdiction was clearly wrong, it would not hesitate to reverse it, in no way detracts from these principles, nor does it detract from the import of *Arizona v. California*, 460 U.S. 605, 75 L.Ed.2d 318, 103 S.Ct. 1382 (1983), cited and followed in the case.

In fact, the implication of the Court's statement that it would not be inclined to reverse its prior decision in the case on jurisdiction unless it was convinced that it was "clearly wrong" adds to the strength of our case. The question of jurisdiction ordinarily may be raised and attacked at any time. It may be raised for the first time on appeal and may even be collaterally attacked. This was one of the bases stated in support of the position of Justice Scalia in the dissenting opinion, joined in by Chief Justice Rehnquist and Justice Thomas. As to the question of jurisdiction and standing, the prior decisions were relied on by the majority and not further considered in

the opinion and ultimate decision in the case, other than as noted above.

In *Arizona v. California*, supra, Justice White, for the majority, rather clearly stated the law of the case doctrine of this Court, and this is still the applicable law. The opinion states:

> . . . As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. * * * (460 U.S. 618)
>
> * * *
>
> Under the law of the case doctrine, as now commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice. * * * (Footnote 8, 460 U.S. 618)
>
> * * *
>
> First, while the technical rules of preclusion are not strictly applicable, the principles upon which these rules are founded should inform our decision. It is clear that res judicata and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment. * * * Nevertheless, a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive. * * * (460 U.S. 619)
>
> * * *
>
> We also fear that the urge to relitigate, once loosed, will not be easily cabined. * * * These considerations, combined with practice in our

> original cases and the strong res judicata interests involved, lead us to conclude that the irrigable-acreage question should not be relitigated. (460 U.S. 625-626)

Justice Brennan, with whom Justices Blackmun and Stevens concurred, wrote an opinion concurring in part and dissenting in part in *Arizona v. California*. They concluded that a manifest injustice would result if the prior ruling were not reconsidered. They nevertheless agreed with the law of the case doctrine stating: "In the absence of some overriding reason, a court should be reluctant to reopen that which has been decided merely to correct an error, even though it has the power to do so." (460 U.S. 644)

It is now abundantly clear that the present law of the case doctrine, as applied by this Court, is actually no different than the law of the case doctrine in New Mexico, and as applied by the New Mexico Supreme Court in this case. Two things must be shown before a prior decision in the same case should be overturned; first that it was clearly erroneous, and, secondly, that a manifest injustice would otherwise result. The record shows no change of circumstances that would work a manifest injustice, other than against the respondents if the prior decisions were not followed, and there was certainly no change of law during the period for which the overcharges were determined. The New Mexico Supreme Court correctly decided both of those issues in favor of the respondents, and the federal constitutional issue was merely collateral in determining whether the first decision was wrong when it was decided.

Stroh calls the Court's decision in our case a "summary" decision, but it also acknowledges that the prior decision considered in *Wyoming v. Oklahoma*, supra, was a summary decision. However, this Court's decision in our case was certainly a considered decision, as Justice Stevens wrote a comprehensive concurring opinion on the constitutional issue. *United States Brewers Assn., Inc., v. Director of the New Mexico Dept. of Alcoholic Beverage Control*, 100 N.M. 216, 688 P.2d 1093 (1983), appeal dismissed, 465 U.S. 1093, 104 S.Ct. 1581, 80 L.Ed.2d 115 (1984). It is the exact same issue which Stroh is now trying to re-litigate, after two decisions against it by the District Court, two decisions against it by the New Mexico Supreme Court, and the decision against it on the same issue by the Supreme Court of the United States. If this is not a case to apply finality and repose under the law of the case doctrine, then it is hard to imagine one that is.

CONCLUSION

This Court has previously decided that this case did not present a substantial federal question. That issue should not be re-litigated at this late date.

In addition, all equities have been determined against Stroh.

The basic and overriding issue in this case is simply whether or not the subject price discrimination law was in effect in New Mexico during the period for which the

overcharges were determined. It is beyond any reason and justice to say that it was not.

Respectfully submitted,

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SUPPLEMENTAL BRIEF IN OPPOSITION OF RESPONDENT DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

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SUPPLEMENTAL BRIEF IN OPPOSITION OF RESPONDENT DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

REASON FOR SUPPLEMENTAL BRIEF

In its reply to briefs in opposition (Stroh Reply), Stroh refers this Court to a case decided on January 22, 1992, entitled *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119 (U.S. Jan. 22, 1992). On January 22, director's brief in opposition had been printed. It was mailed for filing and service on January 23, 1992. Because of these circumstances, director respectfully suggests that the above decision was not then "available" within the meaning of Supreme Court Rule 15.7 and that this supplemental brief

is therefore filed in accord with that unavailability and also in compliance with the rule.

ARGUMENT

THIS COURT'S RECENT DECISION IN WYOMING v. OKLAHOMA SUPPORTS DIRECTOR'S POSITION THAT THE DISMISSAL OF STROH'S 1984 APPEAL IS THE LAW OF THE CASE IN THIS COURT

Director does not and has never taken the position that this Court's law of the case doctrine forbids review of its earlier decisions, as Stroh incorrectly implies. Stroh Reply 2, 3. The crucial question in a law of the case situation is not whether a court may review and change a previous ruling, but whether it *should*. This Court's decision in *Wyoming v. Oklahoma*, 60 U.S.L.W. 4119 (U.S. Jan. 22, 1992) ("*Wyoming*") supports the proposition that the United States Supreme Court applies its own law of the case bar, except when exceptional circumstances exist mandating otherwise.

Wyoming was brought under this Court's original jurisdiction. The State of Wyoming sought a declaration that Oklahoma's legislation requiring its coal-fired electric utilities to burn ten percent (10%) Oklahoma coal was unconstitutional and also sought an injunction forbidding enforcement of the legislation. Oklahoma objected to Wyoming's motion for leave to file its bill of complaint on grounds of lack of standing and lack of jurisdiction. This Court allowed the complaint's filing over the objections and thereafter denied Oklahoma's motion to dismiss based on the same arguments.

The law of the case issue arose when this Court passed on the parties' cross motions for summary judgment (which again raised the standing and jurisdiction issues) and the Special Master's Report related to the motions. The Special Master recommended that the Court reject Oklahoma's third attack on the standing issue. *Wyoming*, 60 U.S.L.W. at 4120. In discussion, Justice White and the majority stated that the Court had "been reluctant to import wholesale law of the case principles into original actions, *Arizona v. California*, 460 U.S. 605, 618-619 (1983)." *Wyoming*, 60 U.S.L.W. at 4122. However, even original jurisdictional cases " 'should be subject to the general principles of finality and repose, absent changed circumstances or unforseen issues not previously litigated.' *Id.*, at 619." *Wyoming*, 60 U.S.L.W. at 4122. Conceding to itself the power to change its prior rulings, the Court nonetheless declared it would do so *only* if they had been "clearly wrong." *Wyoming*, 60 U.S.L.W. at 4122.

The Court went on to confirm the propriety of Wyoming's standing and to agree with the Special Master on the issue. *Wyoming*, 60 U.S.L.W. at 4122. The clear implication of the discussion of law of the case is that *even* when questions of jurisdiction are raised (question which the dissenters thought, if fully considered, so fundamental as to be beyond the doctrine, *Wyoming*, 60 U.S.L.W. at 4126), this Court may invoke its law of the case doctrine and allow the first decision to stand, as long as it was not "clearly wrong."

This is a powerful proposition and builds on the foundation laid in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona*"), another case in this Court's original jurisdiction. There, in analyzing a provision allowing later

review of a prior decree adjudicating water rights among states, the Court set forth the general principles of the law of the case doctrine as encompassing and understanding that departure from the doctrine is justified only if the reviewing Court is "convinced that [the prior holding] is clearly erroneous *and* would work a manifest injustice." [emphasis supplied] *Arizona*, 460 U.S. at 618, Note 8. Justice White, again as in *Wyoming* for the majority, recognized that "a fundamental precept of common law adjudication is that an issue once determined by a competent court is conclusive." *Arizona*, 460 U.S. at 619.

These are precisely the principles that the Supreme Court of New Mexico followed in concluding from the record on appeal that Mew Mexico's law of the case bar applied and that the equities in the case below were in favor of respondents, not Stroh. Such equitable balancing is usually performed by lower courts, not by this one. In original proceedings, however, there may be a need for this Court to balance equities in the first instance and consequently a need to have the barred door of law of the case open a crack more, as the *Wyoming* decision suggested, when the earlier ruling was "clearly wrong."

Based on *Wyoming*, this Court has increased authority to invoke its law of the case bar in dismissing Stroh's petition for certiorari. This Court in 1984 dismissed Stroh's appeal "for want of [a] substantial federal question." *United States Brewers Assn., Inc. v. Rodriguez*, 465 U.S. 1093 (1984). Although the decision was summary in appearance, Justice Stevens' concurring opinion suggests more than summary review of the appeal and also points to the Court's recognition of *Joseph E. Seagram and Sons,*

Inc. v. Hostetter, 384 U.S. 35 (1966) (*"Seagram"*) and its continuing validity – 18 years after it was decided.

This Court was not "clearly wrong" when it dismissed Stroh's first appeal in 1984. *Seagram* was then "good law." Price affirmation laws were valid and in effect in New Mexico and across the country. The only record available in this case establishes and the court below found that the equities lie in favor of respondents and against Stroh, showing that a "manifest injustice" would befall respondents were the New Mexico decision to be altered. The inevitable law of the case inquiry, therefore – whether this Court should depart from the doctrine – here must be answered in the negative.

CONCLUSION

For the above and the reasons set forth in the brief in opposition, the Court should deny Stroh's petition.

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